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In the

Supreme Court of the United States

OCTOBER TERM, 1965

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,
Appellants,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.,
Appellees.

On Appeal From The United States District Court
For The Northern District Of Ohio

JURISDICTIONAL STATEMENT.

Illinois Central Railroad Company
WILLIAM J. O'BRIEN, JR.
ROBERT MITTEN

The Pennsylvania Railroad Company
ROBERT H. BIERMA

Chicago South Shore And South Bend Railroad
EDMUND A. SCHROER
JOHN C. LAWYER

The Belt Railway Company Of Chicago
RICHARD T. CUBBAGE

The Michigan Central Railroad Company
The New York Central Railroad Company
Indiana Harbor Belt Railroad Company
RICHARD O. OLSON

The Scheffer Press, Inc.—ANdover 3-6850

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Appellees.

On Appeal From The United States District Court
For The Northern District Of Ohio

JURISDICTIONAL STATEMENT.

Appellants, Illinois Central Railroad Company (Illinois Central), The Pennsylvania Railroad Company (Pennsylvania), Chicago South Shore and South Bend Railroad (South Shore), The Belt Railway Company of Chicago (Belt), The Michigan Central Railway Company (Michigan Central), The New York Central Railroad Company (New York Central), and the Indiana Harbor Belt Railroad Company (IHB), pursuant to Rule 13(2) of the Rules of the Supreme Court of the United States, submit herewith their statement as to jurisdiction.

OPINIONS BELOW.

The opinion of the District Court with dissent is reported at ..... F. Supp. ....., and is attached hereto as Appendix A. The report and corrected certificate and order of the Interstate Commerce Commission, (Appendix C hereto) sometimes herein referred to as "the Commission", dated October 5, 1959, may be found at 307 I.C.C. 493. A supplemental report and order of the Commission, dated September 19, 1960, (Appendix D) may be found in 312 I.C.C. 277, and a second supplemental report and order of the Commission dated November 26, 1962, (Appendix E) may be found in 317 I.C.C. 502. An order of August 23, 1962 is attached hereto as Appendix F.

JURISDICTION.

This action was brought by New York, Chicago & St. Louis Railway Company (Nickel Plate)* and Chicago, Rock Island and Pacific Railroad Company (Rock Island) under 28 U.S.C. Sections 1336, 1398, 2284, and 2321-25, inclusive, and 5 U.S.C. Section 1009, to enjoin and set aside the reports, certificate, and orders of the Interstate Commerce Commission in Finance Docket No. 19538, *Illinois Central Railway Company, et al.—Construction and Trackage Rights—Lake Calumet Harbor, Cook County, Illinois;* Finance Docket No. 19742, *The Belt Railway Company of Chicago—Trackage Rights, etc.*; and Finance Docket No. 19921, *Michigan Central Railroad Company, et al.—Trackage Rights.*

The judgment of the three-judge district court (Appendix B) vacating the original and supplemental orders of the Interstate Commerce Commission and remanding

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* Subsequent to the filing of suit in the District Court, Nickel Plate was merged into the Norfolk and Western Railway Company.

the case to the Commission for the taking of further evidence on all issues raised herein was filed April 30, 1965. Notice of Appeal was filed by appellants in the United States District Court for the Northern District of Ohio, Eastern Division, on June 18, 1965.

Jurisdiction of the Supreme Court to review the judgment of the three-judge District Court by direct appeal is conferred by 28 U.S.C. Sections 1253 and 2101(b). Such jurisdiction is sustained by a large number of cases, including *United States* v. *Merchants & M. Traffic Asso.*, 242 U.S. 178 (1916); *Skinner & Eddy Corp.* v. *United States*, 294 U.S. 557 (1919); *Interstate Commerce Com.* v. *Mechling*, 330 U.S. 567 (1947); *Dixie Carriers* v. *United States*, 351 U.S. 56 (1956); and *Mechling Barge Lines* v. *United States*, 368 U.S. 325 (1962).

STATUTES INVOLVED.

The National Transportation Policy, 49 U.S.C. preceding Section 1, and Sections 1(18) and 5(2) of the Interstate Commerce Act, 49 U.S.C. 1(18) and 5(2), respectively, and Section 10 of the Administrative Procedure Act, 5 U.S.C. Section 1009, are set forth in Appendix G, attached hereto.

QUESTIONS PRESENTED.

The Commission found that the present and future public convenience and necessity requires construction by certain of the applicants of a line of railroad to the Lake Calumet Harbor Port of Chicago and operation under lease by applicants over the existing tracks of Chicago Regional Port District at Lake Calumet Harbor and that acquisition of trackage rights by certain applicants over the line to be constructed and certain existing tracks would be consistent with the public interest. The questions presented are:

1. Did the district court err in finding that the Commission failed to make all the findings necessary to support its decision and that the findings made were unsupported by substantial evidence in the record?

2. Was the district court in error in concluding that the Commission's exercise of discretion in its refusal to grant a hearing when a lease arrangement between appellants and the Port District for use of the latter's tracks was submitted to the Commission for approval was a denial to Nickel Plate and Rock Island of due process of law, in the light of the fact that a comparable lease had been offered in evidence at the hearing, at which time Nickel Plate and Rock Island were afforded ample opportunity to cross-examine the parties and offer evidence with respect to said lease, and particularly in view of the fact that the terms of the amended executed lease were more favorable to all the railroads, including Rock Island and Nickel Plate, than the terms of the original lease?

3. Did the district court err in finding the Commission erred in the exercise of its discretion in refusing to grant a further hearing on appellants' supplements to applications, in the light of the fact that said supplements were filed at the request of the Commission to cure a technical deficiency in the original applications, and in the light of the fact that evidence in support of said supplements was already a matter of record and that the Commission had so found?

4. Did the district court err in vacating and setting aside the reports and orders of the Commission dated October 5, 1959, September 19, 1960, and November 26, 1962, and the order of the Commission dated August 23, 1962, and enjoining the Commission from enforcing such reports and orders and remanding the case to the Commission for the taking of further evidence upon all of the issues?

STATEMENT OF THE CASE.

This case involves the validity of reports and orders of the Interstate Commerce Commission granting appellants authority under Sections 1(18) and 5(2) of the Interstate Commerce Act to construct certain tracks and operate under trackage rights to serve the facilities of the Chicago Regional Port District at Lake Calumet, near Chicago, in Cook County, Illinois, now served exclusively by Chicago, Rock Island and Pacific Railroad Company (Rock Island).

Lake Calumet Port, a commercial and industrial area with facilities such as grain elevators, warehouses, cold storage places, trucking terminals, and transit sheds, is the major deep water facility of the Port of Chicago. It is in the heart of the city's switching district, contiguous to major arterial highways and presents one of the greatest potentials for the generation of traffic in the mid-continent area of the United States. The Port, a public harbor, is open to all trucking companies, barge lines, and steamships, and it is expected to become a dominant gateway for export grain.

Shippers and receivers, tenants at the Port, shippers in the States tributary to Lake Calumet Harbor, the Board of Trade of Chicago, the Association of Commerce and Industry, the Chicago Regional Port District, and the United States Department of Agriculture supported the application, stressing the need for multiple rail service to insure the growth of the Port.

The combined yard capacity of appellants is twelve times that of the Rock Island and the appellants' car supply is thirty times that of the latter. The proposed service will afford the Port greater availability of one-and two-line switching movements and more single-line, direct

hauls. The method proposed by appellants to reach and serve the Port is the same as used in other similar areas, a common operating practice, both economical and practical, and devoid of favoritism and discrimination.

The Commission found that granting the authority requested (by appellants herein) would result in greater rail competition, better service, and lower rates for the industries at Lake Calumet Harbor.

The Commission found that additional rail service at the Port was required for the future development of the industries now or hereafter to be located there and the complete development of the harbor would be hindered if it were limited to the service of a single trunk line railroad.

The volume of traffic moving through the facilities at the Port was steadily increasing and would multiply many times within the next few years because of its location, and with the opening of the St. Lawrence Seaway.

Rock Island and Nickel Plate, the latter located east of Lake Calumet, contended that appellants' original applications were deficient in failing to request authority under Section 1(18) of the Act to operate over the tracks of the Port District, although Rock Island for many years operated over said tracks without such authority. The Commission found that the proposed operation over the Port tracks would require its specific approval.

Appellants, in compliance with the Commission's findings, filed supplements to their applications to cure the aforesaid technical deficiency, and the Commission, in a supplemental report of September 19, 1960 (312 I.C.C. 277), denied the request of the Nickel Plate and Rock Island for further hearing, and granted the authority re-

quested since the evidence presented at the initial hearings pertained to service over the Port tracks within the Port District.

Appellants initially proposed to lease and maintain the Port tracks and provide switching service to the tenants, the lease to include rental based on 5% of an agreed valuation but not to exceed an amount equivalent to $2.00 per car, loaded or empty, or locomotive handled to or from the property during such year. The proposed lease was approved by the Commission, subject to the elimination of an objectionable clause.

The Commission found the lease agreement as amended to be reasonable and adequate, but cautioned that any further change in its terms and provisions would require the Commission's prior approval and authority. The Commission found that protestants (Nickel Plate and Rock Island) had been afforded unlimited opportunity to cross-examine appellants with reference to the provisions of the lease and had availed themselves of a petition for reconsideration of the Commission's order of October 5, 1959, which directed modification of the lease as originally presented.

In its second supplemental report dated November 26, 1962, (317 I.C.C. 502) the Commission noted that the Port District, on June 12, 1961, executed a modified agreement which differed to a degree from the terms of the approved lease agreement, approval of which was requested by appellants by petition filed December 1, 1961. The Commission pointed out that the question of public convenience and necessity had been determined with only the specific terms and conditions of the operations remaining for approval and the objection of protestants was merely a reiteration of their objections for the over-all proposals of appellants. The Commission denied the request of the

Nickel Plate and Rock Island and found a hearing on the modified agreement was unwarranted.

Specifically, the modified agreement removed the valuation basis for rental payments and substituted therefor a flat user-basis charge of $2.00 per revenue car only. The Commission stated that it had never adopted an exclusive formula to determine reasonableness of proposed rentals of railroad trackage. Rentals were considered reasonable, where, as in the instant case, after arm's length bargaining, the parties reached an agreement which resulted in improved service to the public, financial benefit to all parties, and protestants' ability to continue to serve the public would not be impaired. The changes in the agreement the Commission noted would obviously redound to the benefit of the railroads. The Commission stated the modified agreement was reasonable and adequate to accomplish the purpose for which it was intended.

THE QUESTIONS ARE SUBSTANTIAL.

The issues in the case are vital to shippers and receivers of freight at Lake Calumet Harbor and in areas tributary thereto, the tenants at the Port and those responsible for its development.

The Commission found that since the record showed that approval of the applications would result in greater rail competition, better service, was necessary to meet the public need and would be reasonably profitable, the Commission could issue a certificate authorizing the proposed construction.

We respectfully contend that the decision of the lower court is clearly erroneous in major respects.

1. The court, in quoting the basic important findings of the Commission in support of the order, prefaces the quotations with the comment:—

"Among the important findings for which we find substantial support in this record are the following."

Following a recitation of the findings, the court states:—

"On the basis of the findings indicated above, the Commission entered original and supplemental orders granting the certificates of convenience and necessity sought by the six railroads for operations up to and within the Port District."

The court next cites Title 49 U.S.C. Section 1(18) as conferring specific authority on the Commission to approve extensions of rail service.

Briefly stated, the Court finds the Commission made important findings of fact (for which the Court finds substantial support in the record) and that on the basis of such findings the Commission entered its orders granting the requested authority.

Paradoxically, the Court next, without explanation, after reviewing the conclusions of the Commission reached as a result of the aforesaid findings, attempts to substitute its judgment for that of the Commission and concludes:—

"We feel that this record does not offer ample support in fact and law for the conclusions of the Interstate Commerce Commission quoted above."

When the Court finds the Commission has made important findings of fact and further finds that the record supports such findings, the judicial function of the Court below is exhausted. The orders of the Commission, this Court has decreed should not be set aside, modified or disturbed by a court on review, if they lie within the scope of the Commission's statutory authority and are based upon adequate findings, which are supported by substantial evidence, even though the court might reach

a different conclusion on the facts presented. *Minneapolis & St. Louis Ry. Co.* v. *United States,* 165 F. Supp. 893, 900 Aff'd. 361 U.S. 173; *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U.S. 515, 535; *Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567, 574.

In *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U.S. 515, 535, this Court said:—

> "We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that '. . . the courts must in a litigated case, be the arbiters of the paramount public interest.' This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law."

Although, as pointed out, the Commission found that approval of the applications would result in greater rail competition, and better service which were required for the future development of the industries at the Port, the Court below in substituting its judgment for the Commission cites, presumably in support of its position, decisions of this Court (*Chesapeake and Ohio Railway Co.* v. *United States,* 283 U.S. 35, and *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83) which the dissenting opinion had cited earlier *in support of its position.*

2. The Court below finds that Nickel Plate and Rock Island were denied due process of law when the Commission refused their requests for an additional hearing on the application for approval of the amended agreement between appellants and the Port District for use of the latter's tracks.

The initial agreement was approved by the Commission following the hearing at which time the agreement was introduced in evidence subject to any inquiry and objections Nickel Plate and Rock Island wished to make. Its terms were found to be reasonable to the railroads.

The modified agreement was more favorable to the railroads. The Commission found (317 I.C.C. 502, 507):

> "As indicated, the method of determining rentals provided for in the modified agreement should be more favorable to the applicants than the method set out in the lease agreement which we have previously approved. The other changes in the arrangements between the applicants and the Port District effected by the modified agreement are, for the most part, desirable in that they reword and rearrange the lease agreement to comply with State property laws; show that the agreement is not intended to apply to industry-owned tracks, affect the rights heretofore held by Rock Island, or grant the applicants any exclusive privileges in the Port District's property; and otherwise define more clearly the rights and responsibilities of the parties. Accordingly, we find that the modified agreement for the nonexclusive use of the Port District's trackage and facilities is reasonable and adequate to accomplish the purpose for which it is intended."

In spite of this finding by the Commission, the Court decrees:—

> "A major deficiency exists because the rental provisions under the final plan differ materially from the rental provisions under the plan originally proposed.

> "The record shows what the rental rates will be, but does not show what effect those rates will have on the overall operating costs. • • •
>
> "• • • Certainly, to support a grant of public convenience and necessity, a record should contain evidence as to what impact the rental charge will have upon the profitability of the venture. A hearing following the execution of the final agreement between the applicants and the Port District would have provided that evidence."

The Commission had explained however:—

> "We have never adopted any exclusive formula for determining the reasonableness of proposed rentals for railroad trackage. We believe that rentals generally may be considered reasonable where, as here, the facts of record disclose that nonaffiliated parties, after bargaining at arm's length, have entered into an agreement under which increased service will be offered to the public, all parties to the agreement will benefit financially, and the interveners' ability to continue to serve the public will not be impaired."

Whether petitions for rehearing, reconsideration or reargument should be granted is a matter resting in the sound discretion of the Commission. In *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 534-535, this Court stated:—

> "• • • Except in the single instance, it has been held consistently that rehearings before administrative bodies are addressed to their own discretion. *Interstate Commerce Commission* v. *Jersey City, supra.* Only a showing of the clearest abuse of discretion could sustain an exception to that rule."

What evidence is necessary "to support a grant of public convenience and necessity" is for the Commission to decide. The Commission alone is authorized to decide upon

the weight of evidence or significance of the facts. *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349.

It is obvious the lower court misconceives its own function and exceeds its authority as a reviewing court when it refuses to abide by time honored principles established and reaffirmed by this court governing judicial appeals.

CONCLUSION.

For the reasons stated, we believe that the questions presented by this appeal are substantial and are of such public importance as to require plenary consideration, with briefs and oral argument, for their resolution.

Respectfully submitted,

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By Richard O. Olson,
Their Attorney

APPENDIX A.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Ohio
Eastern Division

NORFOLK AND WESTERN RAILWAY COMPANY, Plaintiff v. UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, Defendants	Civil Action No. 36018

MEMORANDUM ON COMPLAINT SEEKING INJUNCTIVE RELIEF UNDER TITLE 28 U.S.C., SECTIONS 1336, 2284, AND 2321-2325, INCLUSIVE
(Filed Apr 1 1965)

Before: EDWARDS, Circuit Judge, CONNELL, Chief District Judge, and KALBFLEISCH, District Judge.

By order of November 5, 1964, the motion of Thomas O. Broker, Counsel for The New York, Chicago and St. Louis Railroad Company, to change the designation of the plaintiff to Norfolk and Western Railway Company was granted.

This litigation arises out of the national expectation that the completion of the St. Lawrence Seaway will bring a great increase in ocean-going freight to Great Lakes ports in the heartland of the continent. Chicago, the largest city on the Great Lakes, created the Chicago Regional Port District to build a new harbor to serve

this traffic. The Port District prepared docks for the ships to load and unload and trackage for railroad freight cars to serve the docks. Two railroads were closest at hand; six others sought Interstate Commerce Commission permission to build trackage to connect with the Port District. This legal battle has resulted.

These complaints were filed by two railroads to seek an injunction under Title 28, U.S.C., Sections 1336, 2284, and 2321-2325, inclusive, against certain orders of the Interstate Commerce Commission which authorized six other operating railroads to extend their tracks so as to offer direct services to the newly organized Chicago Regional Port District at Lake Calumet near Chicago, Illinois.

One of the two railroads, The New York, Chicago and St. Louis (henceforth the Nickel Plate) has a line so constructed as to parallel and be prepared to serve the east side of Lake Calumet. The other complainant, the Chicago, Rock Island and Pacific Railroad Company and the Pullman Railroad Company (henceforth Rock Island) has trackage adjacent to the west side of Lake Calumet and has been providing service for such port facilities as previously existed at Lake Calumet for many years.

The six operating railroads (whose "invasion" of the Lake Calumet area is resisted by Nickel Plate and Rock Island) initiated the original proceeding before the Interstate Commerce Commission by a series of applications filed, starting in 1956. These applications sought I.C.C. approval of the construction of the necessary trackage and trackage right agreements to interconnect various

of the six railroads to each other and ultimately to the Chicago Port District tracks at Lake Calumet.[1] Subse-

[1] "By application filed October 22, 1956, in Finance Docket No. 19538, the Kensington and Eastern Railroad Company [a nonoperating company], the Illinois Central Railroad Company, The Philadelphia, Baltimore and Washington Railroad Company [a nonoperating company], and The Pennsylvania Railroad Company applied under section 1(18) of the act for authority to construct a line of railroad, approximately 1.431 miles, in Cook County, Ill. The initial segment of 2,900 feet, or 0.549 mile, would be constructed by the Kensington & Eastern at an estimated cost of $222,596; the next 630 feet, or 0.119 mile, would be built by the Illinois Central at an estimated cost of $35,886; and the final 4,030 feet, or 0.763 mile, would be constructed by the Pennsylvania in behalf of the Philadelphia, Baltimore & Washington at an estimated cost of $604,094. Each applicant is to finance its proposed construction from current funds available in their respective treasuries. The track will lead out from the westbound main line of the Kensington & Eastern at a point a short distance east of Doty Avenue and then extend east and north to a connection with the proposed track of Pennsylvania on land owned by the Pennsylvania. A portion of the Pennsylvania construction would be on property leased from the Chicago Regional Port District, hereinafter referred to as the Port District. The connection between the Illinois Central and the Pennsylvania segments would be made at about 130th Street, and the Pennsylvania track, in turn, would connect with the track owned by the Port District.

"In the same application, the Illinois Central, the Pennsylvania, and the Chicago South Shore and South Bend Railroad (South Shore) seek authority under section 5(2) of the act for the acquisition of trackage rights over the line to be constructed and certain existing tracks over which it is necessary to operate in order to reach the Lake Calumet Harbor Port, hereinafter sometimes called the harbor or port. The railroad properties of the Kensington & Eastern are leased to and are operated by the South Shore. A crossover would be installed

quent supplemental applications and amendments sought approval likewise of an agreement between the six railroads and the Chicago Port District for operations within the Port District.

Lengthy hearings were held before the I.C.C. Hearing Examiner in 1957 at which Rock Island and Nickel Plate intervened on leave granted and objected.

Estimates of tonnage anticipated to be handled through the Port subsequent to the opening of the St. Lawrence Seaway made by various witnesses for the petitioners before the Hearing Examiner ran from 30,000,000 tons

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([1] Continued)
between the eastbound and westbound tracks of the Kensington & Eastern, immediately west of the connection with the track leading to the port, to enable trains coming to the harbor to cross from the eastbound to the westbound track of the Kensington & Eastern to enter the track leading to the port.

"By application filed April 25, 1957, in Finance Docket No. 19742, The Belt Railway Company of Chicago (Belt Railway or Chicago Belt) requests authority under section 5(2) of the act to acquire trackage rights over the Illinois Central, the Kensington & Eastern, the South Shore, and the Pennsylvania from a point on its line at or near 95th Street to a point on the railroad tracks of the Port District on the west side of Lake Calumet Harbor, near 130th Street.

"By application filed September 9, 1957, in Finance Docket No. 19921, The Michigan Central Railroad Company, The New York Central Railroad Company, and the Indiana Harbor Belt Railroad Company applied for authority under section 5(2) of the act to acquire trackage rights on behalf of the New York Central and Indiana Harbor Belt over the lines of railroad owned or operated by the Illinois Central, the Kensington & Eastern, the South Shore, and the Pennsylvania leading to Lake Calumet Harbor Port." Illinois Central Railroad, et al. Construction and Trackage Rights, 307 I.C.C. 493, 494-495 (1959) (Footnotes omitted.)

per year to 58,000,000 tons per year, with grain and coal believed likely to constitute the bulk of this tonnage.

Extensive testimony was also taken from representatives of shipping and importing firms and concerns which had prospective economic relationships with the development of the proposed Port District.

We are confronted with two basic problems: (1) whether there is substantial evidence to support the decision of the Interstate Commerce Commission; and (2) the denial to the plaintiffs of due process of law.

The evidence submitted at the hearing before the I.C.C. Hearing Examiner by interveners in that proceeding who are plaintiffs in this one, bore principally upon three points: First, that the prospects of the port were not as rosy as the estimates of its proponents who testified before the Commission would have liked for the Commission to believe; second, that the two intervening railroads, plaintiffs herein, either were serving or were available to serve the port and the general area surrounding it; third, that the railroad service offered by them had been entirely satisfactory and still was. These latter two factual contentions on the part of the intervening railroads were largely undisputed. As to these the dispute lies not over the facts but over the legal conclusions which the opposite parties would seek to draw therefrom.

A subsidiary problem arose, however, during the course of the hearing before the Hearing Examiner and has continued down into the debate before the Interstate Commerce Commission and the presentation of issues to this court. This issue pertains to railroad operations within the Port District itself. The record shows that the Port District had built railroad trackage within its

boundaries to serve the various docks and elevators and other port installations which the port was calculated to provide for. The basic plan for the port contemplated that all railroad operations would move over this Port District trackage. Obviously, therefore, some agreement would have to be provided among the parties if there was to be multiple railroad use as to charges to each and as to the plan of operation for the switching of cars in and out of the Port District.

Nonetheless, petitioners' applications as originally filed and as amended up to the point of the hearing before the Hearing Examiner did not request certificates of convenience and necessity for operation within the boundaries of the Port District. This was explained by petitioners' contention that no such certificates were legally required. Further, they claimed and showed that Rock Island was operating within the Port District without such a certificate. The Interstate Commerce Commission ruled otherwise.

Petitioners did, however, present an unexecuted proposed agreement designed to show a general plan of operation, This was introduced at the hearing before the Examiner and petitioners' witnesses were cross-examined by interveners in relation to it.

With this factual background before him, the Hearing Examiner entered lengthy findings of fact and recommended issuance of the certificates of convenience and necessity which the six railroads had applied for.

Extensive objections having been filed by interveners, the Interstate Commerce Commission heard oral arguments in relation to the objections and handed down a formal opinion containing findings of fact which largely duplicated those of the Hearing Examiner.

Among the important findings for which we find substantial support in this record are the following:

"Lake Calumet Port is the major deepwater port facility of the port of Chicago. It is in the heart of the Chicago railroad switching district, and is contiguous to major arterial highways. Port District facilities and industries have unparalleled access to barge, rail, lake steamer, and motor transportation, and in the immediate future there will be complete access to ocean transportation.

"The port of Chicago has been and will continue to be the major Great Lakes general cargo port insofar as export and import shipments are concerned. Also, beginning with the 1959 shipping season, that port will become a dominant export gateway for grain moving both direct to ports abroad and in some instances to Montreal for forwarding abroad.

• • •

"The Chicago metropolitan area embraces 3,617 square miles, and includes 5 counties in Illinois and 1 in Indiana. In addition to the city itself, the area contains approximately 180 suburban or satellite communities with a total of 14,500 manufacturing establishments employing some 2,800,000 people. The present population of the area is 6,250,000, which is expected to increase to approximately 7,900,000 persons by 1980.

• • •

"The total waterborne traffic from and to the port of Chicago for the year 1955 was 71,490,510 tons, including overseas and Canadian export and import traffic as well as waterborne domestic traffic moving on the Great Lakes and on the Illinois waterways.

• • •

"When the St. Lawrence Seaway, with locks 800 feet long, is opened for the 1959 navigation season, and a draft of 27 feet is made available all the way from Montreal into the principal Great Lakes ports,

there will be an important change in the size and capacity of the vessels engaged in Great Lakes overseas cargo transportation.

"Whereas under the conditions described the ships could not exceed 258 feet, the expectations were that beginning April 1959 the carriers using the enlarged St. Lawrence Seaway will be able to operate vessels about 400 to 450 feet in length. Against the present maximum cargo capacity of 180,000 cubic feet, the larger ships will have space for dry cargo totaling 350,000 cubic feet. In addition, they will have deep tanks ranging to about 15,000 cubic feet and space for 30,000 to 35,000 cubic feet of refrigerated cargo.

• • •

"When the seaway is in operation, it will no longer be a question of vessel supply. The world merchant marine presently has slightly over 6,000 vessels that can navigate the enlarged St. Lawrence Seaway. These vessels total more than 25 million deadweight tons. If only 5 per cent of these ships (approximately 300 vessels) came into the Great Lakes, making 2 to 3 trips a year, there would be 600 to 900 vessels coming into the port of Chicago each season. An efficient, economical interchange of cargo between the land carriers and the watercarriers for such a volume of shipping will necessitate a substantially broadened railroad service into and out of the Lake Calumet port.

• • •

"Good, efficient, and prompt service is always important in general business, but in the field of international commerce it is mandatory.

• • •

"Applicants' plan of operation.—Witnesses on behalf of the applicants emphasize the fact that a large port handling oceangoing traffic cannot efficiently operate unless adequate supporting rail facilities are available. The combined yard capacity of the applicants is 61,601 cars, or more than 12 times

that presently available to serve the port through the Rock Island.

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"The record shows that, if the applications are granted, the movements over the applicants' proposed route into the port will be more direct and will not involve occupation of the South Shore tracks for a longer period of time than at present. Direct delivery by the applicants entails less handling and, being in control of the entire movement to and from the port, applicants would be in position to expedite the shipments as the occasions demand. The proposed operations also would be less expensive because of the elimination of the switching charges now absorbed on line-haul traffic.

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"Some indication of future traffic through the port may be determined from the business generated in the immediate past. At the time of the hearing the port had been in operation for a relatively short period. Witnesses for the operators of the facilities at Lake Calumet Harbor were unanimous in forecasting material increases in the tonnages for the future. The present facilties at the lake are not expected to be utilized to capacity for several years, and large additions are planned for early construction. It is imperative, therefore, that at the very beginning of this new era of development a plan and system for handling the transportation needs of the port be established which will assure the type of service that is expected and will provide for steady progress and expansion."

It should be noted that although this last finding was preceded by a recital of the position of the applicants and that of the interveners pertaining to estimates of future port traffic, these estimates were not adopted by the Interstate Commerce Commission except as stated above.

As to the subsidiary issue pertaining to the operational plan within the Port District, the I.C.C. report of October 5, 1959, (307 I.C.C. 493) may be read as a finding of fact that such a plan was essential, but it also specifically held that supplemental applications must be filed showing the details of such an operational plan for specific certification by the Commission. Such applications were filed and ultimately, after an executed operational agreement between the six railroads and the Port District had been filed, supplemental orders were issued granting the required certificates of convenience and necessity.

As to this phase of the case, although interveners requested it, no additional hearing was ever held.

On the basis of the findings indicated above, the Commission entered original and supplemental orders[2] granting the certificates of convenience and necessity sought by the six railroads for operations up to and within the Port District.

We choose to deal with the issues in this case under separate categories: First, those pertaining to the construction of trackage and leasing agreements for operation over trackage up to the property line of the Port District; and secondly, those issues bearing on operations within the Port District itself.

First Category

Although plaintiffs in this proceeding present a great many questions, we believe as to the first category the material issues can be fairly summarized under three headings:

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[2] These supplemental orders are reported at 312 I.C.C. 277 (1960) and 317 I.C.C. 502 (1962).

First, did the intervening railroads before the Interstate Commerce Commission, the plaintiffs herein, have such rights to the rail business into and out of the Lake Calumet area by virtue of proximity and prior service to this area so as to require this court to invalidate the certificates of convenience and necessity issued to the other six railroads by the Interstate Commerce Commission?

Second, should the orders of the Interstate Commerce Commission complained of under this category be vacated because they are based upon a "stale record," i.e., was there a denial to the plaintiffs of due process of law?

Third, is there substantial evidence to support the orders of the Interstate Commerce Commission granting the six railroads certificates of convenience and necessity for the construction of trackage and trackage lease agreements up to the boundary of the Port District?

Second Category

Issues pertaining to the certificates for operation within the Port District can be summarized in one question:

Under the full record should the supplemental orders of the Interstate Commerce Commission granting certificates of convenience and necessity for the six railroads to operate within the Port District be vacated because said supplemental orders were entered without due process to the plaintiffs?

First Category

As to the first category of issues pertaining to the orders granting permission to operate up to the boundaries of the Port District, the major conclusions of the Interstate Commerce Commission are as follows:

"Consideration of the entire record herein warrants the conclusion that the applications should be approved. Such approval would result in greater rail competition, better service, greater car supply, and lower rates for the industries on Port District property at Lake Calumet Harbor. Direct service to the port by the applicants would place them on a par with the Rock Island insofar as solicitation of originated grain traffic for export is concerned, and the applicants would retain control of their freight equipment made empty at the port, so that such equipment could be returned in fast shuttle service to country elevators without loss of time required by interchange.

"The time has come when additional rail service at the port is required for the future development of the industries now or hereafter to be located there. Better service to shippers and receivers of freight through the elimination of delays, by providing single-line hauls, or more direct hauls, is clearly in the public interest. It would be a detriment and hindrance to the full and complete development of Lake Calumet Harbor if it were limited to the service of a single trunkline railroad when so many adjacent railroads are available and anxious to serve the port. Although the port is now served by approximately 100 common-carrier trucklines, and there is no restriction on the number of barges and ships permitted to serve the port, the Rock Island is the only railroad presently serving the port.

"Congress, the courts, and this Commission have placed a higher value on future convenience and necessity than on the convenience and necessity that

presently might exist in section 1(18) construction proceedings. If the applicants can prove, as they have herein, that the proposed construction either presently or in the reasonably near future is necessary to meet a public need, and will be reasonably profitable, we may issue a certificate authorizing the proposed construction. Transportation service which aids in the future development of a territory is in the public interest. Interstate Commerce Commission v. Oregon-W.R. & Nav. Co., 288 U.S. 14. Considering all the circumstances in these proceedings, particularly the expansion program now in progress at the port, and the increased amount of rail traffic to be made available at the port, we are of the opinion that the additional service of the applicants is warranted. Gulf, M.&O. R. Co. Construction, 271 I.C.C. 541." 307 I.C.C., at 527.

We feel that this record does not offer ample support in fact and law for the conclusions of the Interstate Commerce Commission quoted above.

Title 49, U.S.C., Section 1(18) gives the Interstate Commerce Commission the right to approve extensions of rail service limited only by the requirement that there be substantial showing that "present or future public convenience and necessity" require the extension:

"Extension or abandonment of lines; certificates required; contracts for joint use of spurs, switches, etc. No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or ex-

tended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad." 49 U.S.C., Section 1(18).

It has long been held that provision of competition for shipper benefit was one of the considerations of public convenience and necessity available to the Interstate Commerce Commission under the terms of the act. Chesapeake & Ohio Railway Co. v. United States, 283 U.S. 35 (1931); Schaffer Transportation Co. v. United States, 355 U.S. 83 (1957). See also 33 Law Week, page 2399.

Second Category

As to the issues involved in the operation of the six railroads within the Port District, a recital of additional background facts is required.

In the original applications filed by the six railroads for certificates of convenience and necessity to bring their rail service to the Port District, as we have noted, no such certificates were requested for the operations within the boundaries of the Port District itself. It was apparently the view of the six railroads that if they were able to negotiate agreements with the Port District this took care of the matter without any I.C.C. certificate. In its original report of October 5, 1959, however, the I.C.C. ruled that such certificates of convenience and necessity were necessary for operation of the railroads concerned within the Port District itself:

"We are of the opinion that operation by the applicants into the Port District, as proposed, con-

stitutes an extension of a line of railroad requiring our prior approval * * *." 307 I.C.C. 493, 525.

The I.C.C. further ruled that supplementary applications must be filed seeking certificates of convenience and necessity for operations within the port, and reserved judgment on the unexecuted lease agreement which purported to show the general method of operation contemplated within the port until the filing of such supplementary applications.

The six railroads concerned thereupon complied, filing supplemental applications seeking certificates pertaining to operations within the port and the two intervening railroads then sought a hearing on these supplemental applications. A hearing on the supplemental applications was denied by the I.C.C.

Thereafter, as a result of negotiations between the six railroads and the Port District, an operating agreement was negotiated and executed which did not, however, correspond in several important particulars, including the economic terms, with that which had been previously authorized by the I.C.C.

On the filing of this executed agreement, the I.C.C. issued another supplemental order pointing out the variances and requiring the six railroads to file supplemental applications for permission to operate in accordance with the provisions of the executed agreement and withholding approval until such supplemental applications were filed. The Commission thereupon entered its final supplemental order, dated November 26, 1962, which approved the operating agreement as previously negotiated and signed. It should be noted that at no time during

this proceeding was there any hearing on the terms of the operating agreement. In its final order the Commission dealt with this matter in the following language:

> "In our report of September 19, 1960 [312 I.C.C. 277] we held that a hearing was not necessary for a determination of the questions at issue. We also denied a request of the Rock Island for further hearing by our order of August 23, 1962. Since the general public convenience and necessity for the applicants' operations over the Port District's tracks has been determined with only the specific terms and conditions of such operations remaining for approval, and since most of the interveners' objections to the modified agreement are actually only reiterations of their objections to the overall proposals of the applicants to serve the harbor area which have been previously discussed and disposed of in our prior reports and orders herein, we do not deem it proper to revisit upon the applicants and other parties to the proceeding the additional time and expense of a hearing upon the modified agreement." 317 I.C.C. 502, 503.

It is clear that a certificate of convenience and necessity cannot stand unless it is based on findings of fact supported by substantial evidence. 5 U.S.C., Section 1009(e).

SUMMARY AND CONCLUSION

It appears to us that there are two fatal flaws in the proceedings and the orders of the Interstate Commerce Commission. The first concerns the sufficiency of the evidence to support the I.C.C.'s determination of public convenience and necessity, and the second concerns the denial to the plaintiffs of due process of law.

At the time of the hearing the applicants had not requested the I.C.C.'s permission to operate within the Port District. This failure was due to their belief that such requests were not necessary. The I.C.C. ruled otherwise. As a result of that ruling, the applicants presented evidence at the hearing of a proposed agreement between applicants and the Port District. On the basis of that agreement, and the other evidence presented, the I.C.C. granted the requested authority, contingent upon the proposed plan's being executed.

However, the proposed plan was not executed. Negotiations continued between the applicants and the Port District for several years, with various proposals being considered. Eventually an agreement was reached, and it was upon the basis of this agreement that the I.C.C. finally issued the certificate of public convenience and necessity, without however having granted the parties any further hearings.

One of the provisions of the agreement that was finally consummated governed the rates to be paid by the railroads as rentals to the Port District. The final agreement called for a different formula to be applied in determining the rentals payable to the Port District by the railroads for the use of the District's property. The final agreement differed from the agreement which had been previously authorized by the I.C.C. in several important particulars, including the economic terms.

Thus we see that the I.C.C., after having said that it would issue a certificate of public convenience and necessity if the proposed plan were adopted, nevertheless granted the certificate in spite of the fact that a different plan was adopted without further hearings.

We have concluded that there is insufficient evidence in the record to support the Commission's determination that a certificate of public convenience and necessity should be granted to the applicants to operate within the Port District. This conclusion results from our belief that it is impossible for the Commission to make a supportable determination of public convenience and necessity unless there is adequate evidence in the record as to operating costs. It cannot be disputed that one of the important elements which must be considered in determining whether a certificate of public convenience and necessity should issue is whether the operation can be profitably undertaken. We fail to see how a decision on potential profitability can be made unless there is a record which shows what the operating costs will be. A major deficiency exists because the rental provisions under the final plan differ materially from the rental provisions under the plan originally proposed.

The record shows what the rental rates will be, but does not show what effect those rates will have on the overall operating costs. This is important because the rental is dependent upon the number of cars handled. The only evidence on the effect of specific rates relates to the proposed rates which never were put into effect. Certainly, to support a grant of public convenience and necessity, a record should contain evidence as to what impact the rental charges will have upon the profitability of the venture. A hearing following the execution of the final agreement between the applicants and the Port District would have provided that evidence.

The plaintiffs, although not parties to the final agreement, will be required to operate under the terms of the agreement entered into between their adversaries and

the Port District. They were not given an opportunity to present evidence or to cross-examine the contracting parties concerning the agreement. The fact that plaintiffs did have some opportunity to introduce evidence and to cross-examine in regard to the original proposed agreement does not rectify this omission. The failure to give plaintiffs timely notice before the hearing upon the final agreement was contrary to the Administrative Procedure Act and the rules which Section 1(18) of the Interstate Commerce Act states must be observed; these statutes reflect the constitutional requirements of due process.

It is our conclusion that the Commission's failure to give plaintiffs an opportunity to introduce evidence and to cross-examine witnesses in regard to the various managerial and economic aspects of the final plan by which they were bound, constituted a denial to them of due process of law.

It is our further conclusion that the I.C.C. is required to reconsider the issue of public convenience and necessity with reference to the operations up to the boundaries of the Port District by conducting a complete rehearing. The tracks outside the Port District go only to the boundaries of the District, and the only purpose of building them will be to enable the applicants to operate within the District.

We have concluded that a rehearing is required upon all of the issues for the reason that the operation of railroad services up to the boundaries of the Port District cannot be considered apart from the railroad operation within the Port District.

The original order of the I.C.C. and the supplemental orders dated September 19, 1960, August 23, 1962, and

November 26, 1962, will be vacated and the case will be remanded for the taking of further evidence upon all issues raised herein.

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United States Circuit Judge

/s/ James C. Connell
Chief Judge,
United States District Court

/s/ Gerard E. Kalbfleisch
United States District Judge

The New York, Chicago and St. Louis Railroad v. United States of America and Interstate Commerce Commission—No. 36,018.

Edwards, Circuit Judge, dissenting. This case was heard January 24, 1964. The following opinion was drafted (as its form clearly indicates) as a proposed opinion of the Court and served on April 10, 1964. My colleagues on this Court have responded with a quite different view. With all respect, I tender my original thoughts as a dissent. The only changes are those required to phrase the opinion in the singular.

This litigation arises out of the national expectation that the completion of the St. Lawrence Seaway will bring a great increase in ocean-going freight to Great Lakes ports in the heartland of the continent.[1] Chicago,

[1] For official action in this respect, see Agreement with Canada on St. Lawrence Seaway navigation facilities, June 30, 1954, 5 U.S.T. & O.I.A. 1784, T.I.A.S. No. 3053, U.N.T.S. 210.
33 U.S.C. Chapt. 19, §§ 981-990.
Exec. Order No. 10534, June 9, 1954, F.R. 3413 as amended by Exec. Order No. 10771, June 23, 1958, 23 F.R. 4525.

the largest city on the Great Lakes, created the Chicago Regional Port District to build a new harbor to serve this traffic. The Port District prepared docks for the ships to load and unload and trackage for railroad freight cars to serve the docks. Two railroads were closest at hand; six others sought Interstate Commerce Commission permission to build trackage to connect with the Port District. This legal battle has resulted.

These complaints were filed by two railroads to seek an injunction under Title 28 U.S.C. §§ 1336, 2284 and 2321-2325, incl., against certain orders of the Interstate Commerce Commission which authorized six other operating railroads to extend their tracks so as to offer direct services to the newly organized Chicago Regional Port District at Lake Calumet near Chicago, Illinois.

One of the two railroads, The New York, Chicago and St. Louis (henceforth the Nickel Plate) has a line so constructed as to parallel and be prepared to serve the east side of Lake Calumet. The other complainant, the Chicago, Rock Island and Pacific Railroad Company and the Pullman Railroad Co. (henceforth Rock Island) has trackage adjacent to the west side of Lake Calumet and has been providing service for such port facilities as previously existed at Lake Calumet for many years.

The six operating railroads (whose "invasion" of the Lake Calumet area is resisted by Nickle Plate and Rock Island) initiated the original proceeding before the Interstate Commerce Commission by a series of applications filed, starting in 1956. These applications sought I.C.C. approval of the construction of the necessary trackage and trackage right agreements to interconnect vari-

ous of the six railroads to each other and ultimately to the Chicago Port District tracks at Lake Calumet.[2] Subsequent supplemental applications and amendments sought approval likewise of an agreement between the six railroads and the Chicago Port District for operations within the Port District.

Lengthy hearings were held before the I.C.C. Hearing Examiner in 1957 at which Rock Island and Nickel Plate intervened on leave granted and objected.

The first witness at the hearings was the general manager of the Chicago Regional Port District who gave the following history of the development:

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[2] "By application filed October 22, 1956, in Finance Docket No. 19538, the Kensington and Eastern Railroad Company (a nonoperating company), the Illinois Central Railroad Company, The Philadelphia, Baltimore and Washington Railroad Company (a nonoperating company), and The Pennsylvania Railroad Company applied under section 1(18) of the act for authority to construct a line of railroad, approximately 1.431 miles, in Cook County, Ill. The initial segment of 2,900 feet, or 0.549 mile, would be constructed by the Kensington & Eastern at an estimated cost of $222,596; the next 630 feet, or 0.119 mile, would be built by the Illinois Central at an estimated cost of $35,886; and the final 4,030 feet, or 0.763 mile, would be constructed by the Pennsylvania in behalf of the Philadelphia, Baltimore & Washington at an estimated cost of $604,094. Each applicant is to finance its proposed construction from current funds available in their respective treasuries. The track will lead out from the westbound main line of the Kensington & Eastern at a point a short distance east of Doty Avenue and then extend east and north to a connection with the proposed track of Pennsylvania on land owned by the Pennsylvania. A portion of the Pennsylvania construction would be on property leased from the Chicago Regional Port District, hereinafter referred to as the Port District. The connection between the Illinois Central and the Pennsylvania segments would be made at about 130th Street,

"The development of Lake Calumet Harbor is something that has been thought about and planned for the last 37 years. The original plan for the development of Lake Calumet Harbor was drafted by Arend VanVlissingen in 1920. The basis of this plan was the development of 2250 acres of land and water. The Regional Port District came into existence in 1951 as a result of legislation which was fostered by a sound concept that something had to be done to develop port and harbor facilities in the City of Chicago. From 1951 to 1953 the powers of the Regional Port District were limited. It wasn't until 1953 that the Illinois Legislature granted to the Port District the right to issue its own Revenue Bonds

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([2] Continued)
and the Pennsylvania track, in turn, would connect with the track owned by the Port District.

"In the same application, the Illinois Central, the Pennsylvania, and the Chicago South Shore and South Bend Railroad (South Shore) seek authority under section 5(2) of the act for the acquisition of trackage rights over the line to be constructed and certain existing tracks over which it is necessary to operate in order to reach the Lake Calumet Harbor Port, hereinafter sometimes called the harbor or port. The railroad properties of the Kensington & Eastern are leased to and are operated by the South Shore. A crossover would be installed between the eastbound and westbound tracks of the Kensington & Eastern, immediately west of the connection with the track leading to the port, to enable trains coming to the harbor to cross from the eastbound to the westbound track of the Kensington & Eastern to enter the track leading to the port.

"By application filed April 25, 1957, in Finance Docket No. 19742, The Belt Railroad Company of Chicago (Belt Railway or Chicago Belt) requests authority under section 5(2) of the act to acquire trackage rights over the Illinois Central, the Kensington & Eastern, the South Shore, and the Pennsylvania from a point on its line at

as a result of which the Port District as such could go ahead and make some definite plans for a development. I came with the Port District in the fall of 1953. Before becoming affiliated with the Chicago Regional Port District I was the Manager of Marine Traffic of very large facilities and my record speaks for itself in the promotion of this particular type of activity. The Chicago Regional Port District procured a Quit Claim Deed to the bed of Lake Calumet from the City of Chicago in the spring of 1955, and within almost 4 months thereafter the foundation for a practical plan for financing was put together.

"In 1955 the Port District again realized that the concept of the Port District Act had to be changed because it felt its best public interest would be served by having the law changed so that all of the facilities which it was empowered to create, as well as those which it would develop over a period of years, would, by law, be turned into private hands for lease and operation. To the best of our knowledge this is the

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([2] Continued)
or near 95th Street to a point on the railroad tracks of the Port District on the west side of Lake Calumet Harbor, near 130th Street.

"By application filed September 9, 1957, in Finance Docket No. 19921, The Michigan Central Railroad Company, The New York Central Railroad Company, and the Indiana Harbor Belt Railroad Company applied for authority under section 5(2) of the act to acquire trackage rights on behalf of the New York Central and Indiana Harbor Belt over the lines of railroad owned or operated by the Illinois Central, the Kensington & Eastern, the South Shore, and the Pennsylvania leading to Lake Calument Harbor Port." Illinois Central Railroad, et al. Construction and Trackage Rights, 307 I.C.C. 493, 494-495 (1959) (Footnotes omitted.)

only port authority or board of its type any place in the world that by law has the right to do this. It is important to understand that these facilities, while they have been created by municipal action, are not operated by this municipal corporation, that each facility in itself is a separate entity in the hands of a private operator, which, of course, puts an entirely different complexion on this development.

"On October 1, 1955, we were able to procure the proceeds from the sale of bonds and we were able to finish these facilities within the allotted time and within the amount of money that we had to spend. When we were ready to go ahead with our first stage of development we made it very plain that these facilities were being constructed to handle a complete interchange of domestic business, intrastate, interstate, as well as import and export freight, and it was because of the flexibility and the wide contact that these facilities would have that we were able to lease these facilities when we did.

"On July 1, 1957, we presented to the State of Illinois a revised plan for this development which was approved by the State of Illinois. In this plan we sought to place on one side of the lake all of the facilities that would be adaptable for commercial purposes such as grain elevators, warehouses, cold storage places, trucking terminals, transit sheds and any of the other developments that would come with a commercial setup. It was laid out in that particular fashion because we sought to expose as much of the property as we could to water contact as well as rail contact. It is impractical to conceive of a development of this nature and size without having all of the rail and truck access because no great area of

this type can be created without having a fusion of all of these facilities, and the harbor which we laid out follows more or less a pattern seen in Antwerp, Hamburg, Rotterdam and places like that where over a long period of years the authorities sought to bring into certain areas all of these facilities.

"With respect to industrial setup, the area offered undeniable advantages because raw material could come in by barge or vessel and here be fabricated and processed and shipped away by rail and truck. The development itself offers a composite setup. The area which is east of Lake Calumet should, in some form or another, be added to the harbor complexion, not particularly under the ownership or management of Chicago Regional Port District but the property development as such should be fused in with the lake so that instead of 2000 areas, such as we have now, there would be available a little better than 3000 acres of land which could be integrated into a comprehensive layout and all of the exposures of the slips on the east side have been laid out in that particular fashion so that by pipe line, conveyor, or in any other method the movement of raw materials might go from those areas in and out of the harbor."

The resolution of the Chicago Regional Port District Board of January 15, 1964, pertaining to railroad policy was read into the record by this witness:

"In pursuance of its duty, the Port District Board at its regular meeting under date of January 15, 1954, adopted the following resolution:

"Be It Resolved That the Chicago Regional Port District reaffirm and restate its railroad policy for

Lake Calumet Harbor which policy unequivocably is that the public interest as well as the interests of prospective tenants and users of the Lake Calumet Harbor will be best served by making available to them all accessible railroad service on equal basis, and under no circumstances that a monopoly or exclusive privilege shall be granted to any single railroad carrier to serve the Lake Calumet Harbor.

"'Furthermore, that it shall be the declared policy of the Chicago Regional Port District to foster and attract railroad carriers which have a primary interest in the development of the Lake Calumet Harbor as a rail-truck-barge-ship interchange harbor.'"

And the same witness recited five reasons for the Port District favoring multiple railroad line service:

"The 5 reasons which I gave the Port District Board as to why service by more than one railroad was advisable may be stated as follows:

"First, a district of this particular type if it was served by belt lines, or more railroads, would have more possibilities of 1 and 2-line hauls instead of 3-line hauls. The second reason was the possibility of a strike. If there was a strike on the railroad serving—and we only had one railroad—that all service in and out of the Port District would be stopped and we would be badly, let's say, confused and confined to troubles if this was the case. The third reason was the necessity for car supply. If more railroads were there, more railroads could be called upon to supply cars. The fourth reason was that if more railroads were in, there would be more competition, and naturally we would get better service. The fifth reason we

discussed was the philosophy of a Port of our type in business through an Act of the Legislature trying to serve the public interest, that it was unfair to monopolize the service for one railroad. There was one other reason. I tried to explain to our directors if the Belt Railway Company of Chicago was serving the harbor, that more of their lines, because they were owners, could be contacted directly for, let's say, a better understanding of import and export rates and that I felt these contacts that could be had would be beneficial to the Port, and because of their over-all interest, that we might get better acceptance and quicker establishment of these rates."

Estimates of tonnage anticipated to be handled through the Port subsequent to the opening of the St. Lawrence Seaway made by various witnesses for the petitioners before the Hearing Examiner ran from 30,000,000 tons per year to 58,000,000 tons per year, with grain and coal believed likely to constitute the bulk of this tonnage.

Rock Island's witness, Mr. Marvin Pair, Professor of Economics and Transportation at Tulane University, presented the pessimistic view of the matter at this hearing. He made some detailed comments on the problems of moving deep-sea traffic through the Seaway and concluded: "I do not see how I or anyone can make an accurate estimate of the export and import traffic which will move in and out of the Port."

But this witness also said:

"All I have said about the future of traffic was stated merely to show the impossibility of forecasting of traffic with any degree of accuracy. Notwithstanding what I have said, Lake Calumet Port, as I said

before, has a promising future, because of a good plan, room for development, a territory from which to draw, and presence of bulk commodity traffic, but time alone will tell what volume of traffic will move in and out of the port, and how much of it will move by rail. Grain traffic undoubtedly will represent a substantial portion of the port's business because of the presence of large elevator storage capacity there. What portion of the total volume of this traffic will be moved by railroad to and from the port is difficult to say."

Extensive testimony was also taken from representatives of shipping and importing firms and concerns which had prospective economic relationships with the development of the proposed Port District. Typical of the testimony of the ultimate users of the Port District was this testimony from Thomas H. Coulter, representing the Chicago Association of Commerce and Industry, who stated:

"It is the position of our association that the best interests of Chicago and the Chicago Port District would be served if more than one carrier were given access to port facilities and serve the Chicago Regional Port District."

He continued:

"[I]n my opinion it [the increase in rail service] will benefit shippers in that large section of the midwest that uses the Port of Chicago for export and import traffic, and on other traffic interchanged between different types of carriers at Port District facilities."

When asked for reasons to substantiate this opinion the witness gave a detailed analysis of past and projected

industrial growth in the Chicago area and the midwest. In addition the witness gave figures on the number of new shipping lines which called at the Chicago port, as well as those which were expected to use the port upon completion of the Seaway. Based on this analysis the witness concluded:

> "With this additional service it is anticipated that over-seas export and import traffic will increase substantially, and that within five years the traffic moveing through the Port of Chicago is estimated at one and one-half million tons, or six times its present volume.
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> "To take care of this increased traffic, we will need within the next decade all of the port facilities now being planned for the convenience of industries located within the Port District, within the Chicago metropolitan area and for all shippers and receivers of export and import traffic through the Port of Chicago. We feel that additional rail lines should be permitted to serve the Chicago Regional Port District."

The above is only a sample of the evidence included in the lengthy record of over 1500 typed pages developed before the Hearing Examiner for the I.C.C. While what I have quoted herein is principally the testimony of the petitioners, it is highly relevant to the instant case, since in this proceeding the basic question is not the wisdom or correctness of the administrative decision of the Interstate Commerce Commission, but whether or not there was substantial evidence to uphold it.

The evidence submitted at the hearing before the I.C.C. Hearing Examiner by interveners in that proceeding who

are plaintiffs in this one, bore principally upon three points: First, that the prospects of the port were not as rosy as the estimates of its proponents who testified before the Commission would have liked for the Commission to believe.

Secondly, that the two intervening railroads, plaintiffs herein, either were serving or were available to serve the port and the general area surrounding it.

Third, that the railroad service offered by them had been entirely satisfactory and still was.

These latter two factual contentions on the part of the intervening railroads were largely undisputed. As to these the dispute lies not over the facts but over the legal conclusions which the opposite parties would seek to draw therefrom.

As to the first contention pertaining to the prospects of the port, the nature of defendant's testimony in that regard has already been indicated above.

A subsidiary problem arose, however, during the course of the hearing before the Hearing Examiner and has continued down into the debate before the I.C.C. and the presentation of issues to this court. This issue pertains to railroad operations within the Port District itself. The record shows that the Port District had built railroad trackage within its boundaries to serve the various docks and elevators and other port installations which the port was calulated to provide for. The basic plan for the port contemplated that all railroad operations would move over this Port District trackage. Obviously, therefore, some agreement would have to be provided among the parties if there was to be multiple railroad use as to charges to each and as to the plan of operation for the switching of cars in and out of the Port District.

Nonetheless, petitioners' applications as originally filed and as amended up to the point of the hearing before the Hearing Examiner, did not request certificates of convenience and necessity for operation within the boundaries of the Port District. This was explained by petitioners' contention that no such certificates were legally required. Further, they claimed and showed that Rock Island was operating within the Port District without such a certificate.

Petitioners did, however, present an unexecuted proposed agreement designed to show a general plan of operation. This was introduced at the hearing before the Examiner and petitioners' witnesses were cross-examined by interveners in relation to it.

Which this factual background before him, the Hearing Examiner entered lengthy findings of fact and recommended issuance of the certificates of convenience and necessity which the six railroads had applied for.

Extensive objections having been filed by interveners, the Interstate Commerce Commission heard oral arguments in relation to the objections and handed down a formal opinion containing findings of fact which largely duplicated those of the Hearing Examiner.

Among the important findings for which I find substantial support in this record are the following:

> "Lake Calumet Port is the major deepwater port facility of the port of Chicago. It is in the heart of the Chicago railroad switching district, and is contiguous to major arterial highways. Port District facilities and industries have unparalleled access to barge, rail, lake steamer, and motor transportation, and in the immediate future there will be complete access to ocean transportation.

"The port of Chicago has been and will continue to be the major Great Lakes general cargo port insofar as export and import shipments are concerned. Also, beginning with the 1959 shipping season, that port will become a dominant export gateway for grain moving both direct to ports abroad and in some instances to Montreal for forwarding abroad.

• • •

"The Chicago metropolitan area embraces 3,617 square miles, and includes 5 counties in Illinois and 1 in Indiana. In addition to the city itself, the area contains approximately 180 suburban or satellite communities with a total of 14,500 manufacturing establishments employing some 2,800,000 people. The present population of the area is 6,250,000, which is expected to increase to approximately 7,900,000 persons by 1980.

• • •

"The total waterborne traffic from and to the port of Chicago for the year 1955 was 71,490,510 tons, including overseas and Canadian export and import traffic as well as waterborne domestic traffic moving on the Great Lakes and on the Illinois waterways.

• • •

"When the St. Lawrence Seaway, with locks 800 feet long, is opened for the 1959 navigation season, and a draft of 27 feet is made available all the way from Montreal into the principal Great Lakes ports, there will be an important change in the size and capacity of the vessels engaged in Great Lakes overseas cargo transportation.

"Whereas under the conditions described the ships could not exceed 258 feet, the expectations were that beginning April 1959 the carriers using the enlarged

St. Lawrence Seaway will be able to operate vessels about 400 to 450 feet in length. Against the present maximum cargo capacity of 180,000 cubic feet, the larger ships will have space for dry cargo totaling 350,000 cubic feet. In addition, they will have deep tanks ranging to about 15,000 cubic feet and space for 30,000 to 35,000 cubic feet of refrigerated cargo.

• • •

"When the seaway is in operation, it will no longer be a question of vessel supply. The world merchant marine presently has slightly over 6,000 vessels that can navigate the enlarged St. Lawrence Seaway. These vessels total more than 25 million deadweight tons. If only 5 per cent of these ships (approximately 300 vessels) came into the Great Lakes, making 2 to 3 trips a year, there would be 600 to 900 vessels coming into the port of Chicago each season. An efficient, economical interchange of cargo between the land carriers and the watercarriers for such a volume of shipping will necessitate a substantially broadened railroad service into and out of the Lake Calumet port.

• • •

"Good, efficient, and prompt service is always important in general business, but in the field of international commerce it is mandatory.

• • •

"Applicants' plan of operation.—Witnesses on behalf of the applicants emphasized the fact that a large port handling oceangoing traffic cannot efficiently operate unless adequate supporting rail facilities are available. The combined yard capacity of the applicants is 61,601 cars, or more than 12 times that presently available to serve the port through the Rock Island.

• • •

"The record shows that, if the applications are granted, the movements over the applicants' proposed route into the port will be more direct and will not involve occupation of the South Shore tracks for a longer period of time than at present. Direct delivery by the applicants entails less handling and, being in control of the entire movement to and from the port, applicants would be in position to expedite the shipments as the occasions demand. The proposed operations also would be less expensive because of the elimination of the switching charges now absorbed on line-haul traffic.

• • •

"Some indication of future traffic through the port may be determined from the business generated in the immediate past. At the time of the hearing the port had been in operation for a relatively short period. Witnesses for the operators of the facilities at Lake Calumet Harbor were unanimous in forecasting material increases in the tonnages for the future. The present facilities at the lake are not expected to be utilized to capacity for several years and large additions are planned for early construction. It is imperative, therefore, that at the very beginning of this new era of development a plan and system for handling the transportation needs of the port be established which will assure the type of service that is expected and will provide for steady progress and expansion.

It should be noted that although this last finding was preceded by a recital of the position of the applicants and that of the interveners pertaining to estimates of future port traffic, these estimates were not adopted by the I.C.C. except as stated above.

As to the subsidiary issue pertaining to the operational plan within the Port District, the I.C.C. report of October 5, 1959, (307 I.C.C. 493) may be read as a finding of fact that such a plan was essential, but it also specifically held that supplemental applications must be filed showing the details of such an operational plan for specific certification by the Commission. Such applications were filed and ultimately, after an executed operational agreement between the six railroads and the Port District had been filed, supplemental orders were issued granting the required certificates of convenience and *necessity*.

As to this phase of the case, although interveners requested it, no additional hearing was ever held.

On the basis of the findings indicated above, the Commission entered original and supplemental orders[3] granting the certificates of convenience and necessity sought by the six railroads for operations up to and within the Port District.

I choose to deal with the issues in this case under separate categories: first, those pertaining to the construction of trackage and leasing agreements for operation over trackage up to the property line of the Port District. And, secondly, those issues bearing on operations within the Port District itself.

First Category

Although plaintiffs in this proceeding present a great many questions, I believe as to the first category the material issues can be fairly summarized under three headings.

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[3] These supplemental orders are reported at 312 I.C.C. 277 (1960) and 317 I.C.C. 502 (1962).

First, did the intervening railroads before the I.C.C. the plaintiffs herein, have vested rights to the rail business into and out of the Lake Calumet area by virtue of proximity and prior service to this area so as to require this court to invalidate the certificates of convenience and necessity issued to the other six railroads by the I.C.C.?

Second, should the orders of the I.C.C. complained of under this category be vacated because they are based upon a "stale record" in that comparing figures sought to be presented subsequently by plaintiffs herein, the actual freight moving into and out of the Lake Calumet Port District has been substantially less than the estimates presented at the I.C.C. hearing?

Third, is there substantial evidence to support the orders of the I.C.C. granting the six railroads certificates of convenience and necessity for the construction of trackage and trackage lease agreements up to the boundary of the Port District?

Second Category

The issues can be summarized in one question:

Under the full record should the supplemental orders of the I.C.C. granting certificates of convenience and necessity for the six railroads to operate within the Port District be vacated because said supplemental orders were entered without hearing?

First Category

As to the first category of issues pertaining to the orders granting permission to operate up to the boundaries of the Port District, the major conclusions of the I.C.C. are as follows:

"Consideration of the entire record herein warrants the conclusion that the applications should be approved. Such approval would result in greater rail competition, better service, greater car supply, and lower rates for the industries on Port District property at Lake Calumet Harbor. Direct service to the port by the applicants would place them on a par with the Rock Island insofar as solicitation of originated grain traffic for export is concerned, and the applicants would retain control of their freight equipment made empty at the port, so that such equipment could be returned in fact shuttle service to country elevators without loss of time required by interchange.

"The time has come when additional rail service at the port is required for the future development of the industries now or hereafter to be located there. Better service to shippers and receivers of freight through the elimination of delays by providing single-line hauls, or more direct hauls, is clearly in the public interest. It would be a detriment and hinderance to the full and complete development of Lake Calumet Harbor if it were limited to the service of a single trunkline railroad when so many adjacent railroads are available and anxious to serve the port. Although the port is now served by approximately 100 common-carrier trucklines, and there is no restriction on the number of barges and ships permitted to serve the port, the Rock Island is the only railroad presently serving the port.

"Congress, the courts, and this Commission have placed a higher value on future convenience and necessity than on the convenience and necessity that pres-

ently might exist in section 1(18) construction proceedings. If the applicants can prove, as they have herein, that the proposed construction either presently or in the reasonably near future is necessary to meet a public need, and will be reasonably profitable, we may issue a certificate authorizing the proposed construction. Transportation service which aids in the future development of a territory is in the public interest. Interstate Commerce Commission v. Oregon-W.R. & Nav. Co., 288 U.S. 14. Considering all the circumstances in these proceedings, particularly the expansion program now in progress at the port, and the increased amount of rail traffic to be made available at the port, we are of the opinion that the additional service of the applicants is warranted. Gulf M. & O. R. Co. Construction, 271 I.C.C. 541." 307 I.C.C., at 527.

I feel that this record offers ample support in fact and law for the conclusions of the Interstate Commerce Commission quoted above.

First, exclusive rights in perpetuity to railroad business are not created by proximity and prior service, however adequate that service may have been. Indian Valley R.R. v. United States, 52 F. 2d 485, (N.D. Cal. 1931); Pennsylvania Railroad v. United States, 40 F. 2d 921 (W.D. Pa. 1930).

The Illinois Supreme Court opinion in the I.C.C. case, Chicago, Rock Island & Pacific Railroad, et al. v. Illinois Commerce Commission, ex rel., 414 Ill. 134, Ill. N.E.2d 136 (1953), which plaintiff Rock Island relies upon so strongly, is patently not controlling precedent in relation to federal law.

Title 49 U.S.C. § 1(18) gives the Interstate Commerce Commission the right to approve extensions of rail service limited only by the requirement that there be substantial showing that "present or future public convenience and necessity" require the extension:

> "Extension or abandonment of lines; certificates required; contracts for joint use of spurs, switches, etc. No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad." 49 U.S.C. §1(18).

It has long been held that provision of competition for shipper benefit was one of the considerations of public convenience and necessity available to the I.C.C. under the terms of the act. Chesapeake & Ohio Railway Co. v. United States, 283 U.S. 35 (1931); Schaffer Transportation Co. v. United States, 355 U.S. 83 (1957).

The first of these cases phrases the matter thus:

> "In the absence of a plain declaration to that effect, it would be unreasonable to hold that Congress did not intend to empower the Commission to authorize construction of new lines to provide for shippers such competing service as it should find to be con-

venient or necessary in the public interest." Chesapeake & Ohio Railway v. United States, supra, at 42.

The second of these cases in interpreting the effect of the National Transportation Policy amendments of 1940 quoted this language with approval:

> "'[N]o carrier is entitled to protection from competition in the continuance of a service that fails to meet a public need, nor, by the same token, should the public be deprived of a new and improved service because it may divert some traffic from other carriers.'" Schaffer Transportation Co. v. United States supra, at 91.

Second, in its presentation of the "stale record" argument, plaintiffs rely principally upon a single case, Atchison, Topeka & Santa Fe Railway Co. v. United States, 284 U.S. 248 (1932). (See also State of Oklahoma v. United States, 193 F. Sup. 261 (W.D. Okla., 1960)). In this case certain I.C.C. rate orders which affected the entire economic future of the railroad were based upon a record written entirely in a period prior to the happening of the major depression of the 1930's, but said orders were scheduled to become effective well after the impact of that depression. In this situation the court took judicial notice of that which no living human being in the country could fail to be aware of, and vacated the orders and granted rehearings on the changed economic circumstances.

Here the complaint is that the facts have not measured up to the predictions of increased freight tonnage moving into and out of the Port District up to the time the matter was argued before this court. It is suggested that

on this ground the entire proceeding be reopened with the taking of further testimony which would show more accurately the prospect and future of this port.

As I have noted, the Commission had before it testimony of the petitioning six railroads, plus testimony presented by the two intervening railroads. The testimony presented by petitioners was distinctly optimistic in relation to the future of the Port District. The testimony presented by the interveners in comparison was distinctly pessimistic. As I have noted, however, the I.C.C. report was not based on the specific estimates of the witnesses for the applicants. The significant thing is that the record fails to disclose any testimony which denies that the Lake Calumet Harbor facility proposed to be operated by the Chicago Regional Port District has a promising future with reasonable contemplation of material increases in tonnage of freight moving through it.

Under these circumstances it does not appear to me that the results of a few years of operations (which plaintiffs here seek to show) would invalidate the basic findings and conclusions entered by the I.C.C. in relation to the prospects and future of the Port District, and the question of convenience and necessity for added rail service. In my judgment the denial of rehearing was clearly within the Commission's discretion. United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515 (1946); Interstate Commerce Commission v. City of Jersey City, 322 U.S. 503 (1944). Nor do I find any denial of due process on this issue.

Third, the major issue in this category, of course, is whether or not there is substantial evidence to support the findings of the Interstate Commerce Commission and

its orders granting certificates of convenience and necessity for six additional railroads to serve this port.

Most of what has been said to this point in this opinion furnishes background and substantiation for my answer. In addition to testimony pertaining to the strategic location of the port and its prospects for future expansion of freight usage, I have referred to the expert testimony which detailed the advantages in port operation of multiple railroad service. These advantages include such major factors as single-line service and rates, multiple-line service in the event of a rail strike by one road, the vastly increased number of freight cars made available under the expanded rail service to the Port District, and the use of the extensive additional marshaling yards made available for Port District service by the addition of the six railroads. There is established precedent for the I.C.C. to consider all of these factors as important aspects of its determination of "present or future public convenience and necessity." Chesapeake & Ohio Railway Company v. United States, supra; Interstate Commerce Commission v. Oregon-Washington Railroad & Navigation Company, 288 U.S. 14 (1933).

Further, it seems to be the policy of the Interstate Commerce Commission—as expressed herein and elsewhere—on a showing of public interest to make public terminal facilities generally available to all railroads which are so located as to be able to render practical service. Atchison, Topeka & Santa Fe Railway Company Construction, 261 I.C.C. 227 (1945); City of Milwaukee v. Chicago & North Western Railway Company, 279 I.C.C. 521 (1950).

It is interesting to note that this policy was applied in this same I.C.C. order in favor of Rock Island in

relation to service to The Calumet Harbor Terminals, Inc.—a privately-owned and operated terminal adjacent to the Port District and now owned by the Pennsylvania Railroad. (See 49 U.S.C. § 3(5)).

On the record taken as a whole, the orders of the Commission dated October 5, 1959, are amply supported by substantial evidence and are held to be within its statutory discretion.[4]

Second Category

As to the issues involved in the operation of the six railroads within the Port District, a recital of additional background facts is required.

In the original applications filed by the six railroads for certificates of convenience and necessity to bring their rail service to the Port District, as I have noted, no such certificates were requested for the operations within the boundaries of the Port District itself. It was apparently the view of the six railroads that if they were able to negotiate agreements with the Port District, this took care of the matter without any I.C.C. certificate. In its original report of October 5, 1959, however, the I.C.C. ruled that such certificates of convenience and necessity were necessary for operation of the railroads concerned within the Port District itself:

> "We are of the opinion that operation by the applicants into the Port District, as proposed, constitutes an extension of a line of railroad requiring our prior approval. . . ." 307 I.C.C. 493, 525.

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[4] By so saying I specifically indicate consideration and rejection of the strained statutory construction sought by plaintiff Nickel Plate in section D.3. of its brief.

The I.C.C. further ruled that supplementary applications must be filed seeking certificates of convenience and necessity for operations within the port, and reserved judgment on the unexecuted lease agreement which purported to show the general method of operation contemplated within the port until the filing of such supplementary applications.

The six railroads concerned thereupon complied, filing supplemental applications seeking certificates pertaining to operations within the port and the two intervening railroads then sought a hearing on these supplemental applications. A hearing on the supplemental applications was denied by the I.C.C.

Thereafter, as a result of negotiations between the six railroads and the Port District, an operating agreement was negotiated and executed which did not, however, correspond in several important particulars (including the economic terms) with that which had been previously authorized by the I.C.C.

On the filing of this executed agreement, the I.C.C. issued another supplemental order pointing out the variances and requiring the six railroads to file supplemental applications for permission to operate in accordance with the provisions of the executed agreement and withholding approval until such supplemental applications were filed. Subsequently, supplemental applications were filed. The Commission thereupon entered its final supplemental order, dated November 26, 1962, which approved the operating agreement as previously negotiated and signed. It should be noted that at no time during this proceeding was there any hearing on the terms of the operating agreement. In its final order the Commission dealt with this matter in the following language:

"In our report of September 19, 1960 [312 I.C.C. 277] we held that a hearing was not necessary for a determination of the questions at issue. We also denied a request of the Rock Island for further hearing by our order of August 23, 1962. Since the general public convenience and necessity for the applicants' operations over the Port District's tracks has been determined with only the specific terms and conditions of such operations remaining for approval, and since most of the interveners' objections to the modified agreement are actually only reiterations of their objections to the overall proposals of the applicants to serve the harbor area which have been previously discussed and disposed of in our prior reports and orders herein, we do not deem it proper to revisit upon the applicants and other parties to the proceeding the additional time and expense of a hearing upon the modified agreement." 317 I.C.C. 502,503.

It appears to me that the Commission has taken the point of view that since it had before it a factual record which it felt provided a sufficient basis for a finding of convenience and necessity, that the six railroads should be permitted to serve the Port District, and since the plan for such service clearly calls for and implies the necessity of operation within the Port District, that, therefore, on the filing by the six railroads of appropriate supplemental applications seeking certificates of convenience and necessity for the operations within the Port District, the Interstate Commerce Commission had before it sufficient factual information from the prior hearing to approve the plan of operation thus brought to its attention.

In contending that no additional hearing was necessary in relation to this phase of the case, counsel for the I.C.C. points out that the statute does not in terms require a hearing, and argues further that the issues pertaining to

the operating agreement which were settled by negotiation between the six railroads and the Port District were in the view of the I.C.C. only technicalities necessary to implement a general plan of operation as to which adequate testimony had been taken before the Commission in the original hearing.

In his argument counsel for the I.C.C. relied upon the "arm's length negotiations" between the six railroads and the Port District which resulted in the ultimate economic terms which were incorporated in the operating agreement.

Whatever might be the situation if all the railroads interested in serving the Port District had participated in those negotiations and had signed the agreement and submitted it to the I.C.C., this is patently not the picture which we have before us. Two of the railroads with a direct and continuing interest in service to the Port District—one of which is, indeed, the only one currently serving it—obviously have tremendous economic and operating interests in the agreement negotiated between six of their competitors and the Port District without their participation.

I am not oblivious of the fact that the I.C.C. has gone to some lengths to protect certain of the interests of the plaintiffs herein. The original I.C.C. order of October 5, 1959, required a nonexclusionary redraft of the proposed operating agreement which in its original terms would have put Rock Island's continued service to the Port District entirely at the mercy of its six competitors.

But, no matter how fair its motives or how great its expertise, I doubt that such factors in a public commission can safely be substituted for the right of a company engaged in economic competition in a proper hearing to state its own position and advance its own claims as to

matters vital to its interests. Such a hearing is provided for in the act.

Moreover, it is clear that a certificate of convenience and necessity cannot stand unless it is based on findings of fact supported by substantial evidence. 5 U.S.C. § 1009(e); Pennsylvania Railroad v. United States, supra; Interstate Commerce Commission v. City of Jersey City, supra.

In relation to the supplemental orders of the I.C.C. to which I have referred, I do not find such substantial evidence. In fact, there is no evidentiary record at all upon which the I.C.C. approval of the detailed operating plan of the six railroads within the Port District or the economic terms of the operating agreement could be based.

I note the suggestion, of course, that the operating agreement "arrived at through arm's length bargaining" which was submitted to the I.C.C. is sufficient evidence to support the details of the operating plan, and that the necessity of some plan was clearly forecast by the volume of evidence at the first hearing.

As to the necessity for an operating plan with the Port District, I have no doubt that ample evidence was presented at the original hearing. As to the detailed operational and financial features of the agreement executed between the six railroads and the Port District, we have another matter.

The executed agreement was not evidence which could be regarded as binding upon the intervening railroads before the I.C.C. Their interests were directly affected both as to how their cars would get into and out of the Port District and as to what they would have to pay for the services. To a railroad company like Rock Island currently doing $800,000 worth of freight business in this port each year, these are hardly topics to be dismissed as matters of a technical nature only.

I think a hearing in relation to the supplemental applications referred to above should have been held—and now must be. As I have indicated, I believe this holding is demanded by statute and applicable case law. But if this were not so, I would still believe this hearing to be required in the fact situation I have outlined as a matter of fundamental fairness mandated by the due process clause of the fifth amendment.

The hearing should be limited precisely to evidence bearing directly upon the technical requirements and fairness of the operating plan within the Port District and the charges necessary to support this service. By this language I mean specifically to exclude rehearing of the basic convenience and necessity issues as to multiple rail service up to the Port District.

I appreciate that there is some inconsistency between the expressed view of the I.C.C. that these problems should be handled as a whole and my requirement of a limited hearing on the supplemental applications. Actually, there is inconsistency implicit also in the I.C.C.'s own order requiring supplemental applications and supplemental orders. This is, however, a problem of size and complexity with many ramifications. As to most of its phases (and as to all of its most important phases) there has been a thorough hearing and fair consideration. I find no logic which requires, or statutory mandate or due process lack which commands, that this all be done over again.

The report and orders of the I.C.C. of October 5, 1959, are held to be amply supported by this record, and as to them the relief sought should be denied.

The supplemental orders of the I.C.C. dated September 19, 1960, August 23, 1962, and November 26, 1962, should be vacated and the case remanded for proceedings consistent with this opinion.

APPENDIX B.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Ohio
Eastern Division

Norfolk And Western Railway Company, Plaintiff and Chicago, Rock Island And Pacific Railroad Company, and Pullman Railroad Company, Intervening Plaintiffs v. United States of America, and Interstate Commerce Commission, Et Al., Defendants	Civil Action No. 36018

DECREE
(Filed Apr 30 '65)

This cause having been heard on the complaints of The New York, Chicago and St. Louis Railroad Company, subsequently merged into Norfolk and Western Railway Company, the Chicago, Rock Island and Pacific Railroad Company, and Pullman Railroad Company, seeking to annul, set aside and enjoin reports and orders of the Interstate Commerce Commission including those dated October 5, 1959, September 19, 1960, August 23, 1962, and November 26, 1962, in proceedings designated as Finance Docket Nos. 19538, 19448, 19742, and 19921, Illinois Central Railroad Company, et al., Construction and Trackage Rights—Lake Calumet Harbor, Cook County, Illinois, and related dockets, which reports and orders of the Commission by their terms approved, authorized, and issued

certificates for trackage rights, construction and operation to and within the Chicago Regional Port District, Chicago, Illinois; the parties having filed briefs and having been heard through counsel on argument before this Court; the issues having been duly tried and considered, and the Court having concluded from the record that there is insufficient evidence in the record to support the Commission's determination with respect to public convenience and necessity and that due process of law had been denied plaintiffs:

It is hereby ordered and adjudged and decreed that the reports and orders of the Interstate Commerce Commission including those dated October 5, 1959, September 19, 1960, August 23, 1962, and November 26, 1962, be and they are hereby vacated and set aside in accordance with the opinion of this Court, that the Interstate Commerce Commission is hereby enjoined from enforcing such reports and orders, and that the case is remanded to the Interstate Commerce Commission for the taking of further evidence upon all of the issues raised herein.

Issued at Cleveland, Ohio, this 30th day of April, 1965.

/s/ James C. Connell
James C. Connell, Chief District Judge

/s/ Girard E. Kalbfleisch
Girard E. Kalbfleisch, District Judge

APPENDIX C.

APPENDIX C.

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET No. 19538[1]

ILLINOIS CENTRAL RAILROAD COMPANY ET AL. CONSTRUCTION AND TRACKAGE RIGHTS, LAKE CALUMET HARBOR, COOK COUNTY, ILL.

Decided October 5, 1959

1. Certificate issued authorizing construction by the Illinois Central Railroad Company, the Kensington & Eastern Railroad Company, the Philadelphia, Baltimore & Washington Railroad Company, and The Pennsylvania Railroad Company of a line of railroad extending from a point near Doty Avenue to the Lake Calumet Harbor Port of Chicago, in Cook County, Ill.; and acquisition of trackage rights by the Illinois Central Railroad Company, The Pennsylvania Railroad Company, and the Chicago South Shore and South Bend Railroad over the line to be constructed and certain existing tracks, approved and authorized. Conditions prescribed.

2. Acquisition of trackage rights by the Belt Railway Company of Chicago over lines of railroad leading to the Lake Calumet Harbor Port of Chicago, owned, operated, or to be constructed by the Illinois Central Railroad Company, the Kensington & Eastern Railroad Company, the Chicago South Shore and South

[1] This report also embraces Finance Docket No. 19448, Michigan Central Railroad Company Et Al. Construction, Etc.; Finance Docket No. 19742, Belt Railway Company of Chicago Trackage Rights, Etc.; and Finance Docket No. 19921, Michigan Central Railroad Company et al. Trackage Rights.

Bend Railroad, and The Pennsylvania Railroad Company, approved and authorized. Conditions prescribed.

3. Acquisition of trackage rights by the Michigan Central Railroad Company, The New York Central Railroad Company, and the Indiana Harbor Belt Railroad Company over lines of railroad leading to the Lake Calumet Harbor Port of Chicago, owner or operated by the Illinois Central Railroad Company, the Kensington & Eastern Railroad Company, the Chicago South Shore and South Bend Railroad, and The Pennsylvania Railroad Company, approved and authorized. Conditions prescribed.

4. Application of the Michigan Central Railroad Company, the New York Central Railroad Company, and the Indiana Harbor Belt Railroad Company for authority to construct and operate a line of railroad from 126th Street, Chicago, to the Lake Calumet Harbor Port of Chicago, in Cook County, Ill., Finance Docket No. 19448, dismissed.

5. Motions of interveners in opposition to dismiss the applications in Finance Docket Nos. 19538, 19742, and 19921, for want of jurisdiction, overruled.

William J. O'Brien, Jr., Joseph H. Wright, Robert H. Bierma, Richard A. Olson, Martin J. Keating, Edmund A. Schroer, Frank F. Vesper, Richard T. Cubbage, E. E. Boyner, F. C. Gagen, Robert H. Pratt, Floyd Stuppi, John B. Goodrich, and *Eugene S. Davis* for applicants.

Leonard M. Shinn and *Joseph E. Quin* for the Secretary of Agriculture of the United States, and the United States Department of Agriculture, interveners in support of the applications.

Joseph M. Arnold, John S. Burchmore, Robert N. Burchmore, A. J. Maurer, A. H. Schwietert, J. S. Chartrand, and R. D. Erickson for other interveners in support of the applications.

Bruce Dwinell, John L. Bordes, John Guandolo, and *Thomas O. Broker* for railroad interveners in opposition.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions to the report proposed by the examiner were filed by the interveners in opposition, and the applicants replied. Oral argument was heard.

These proceedings involve the efforts of 6 operating railroads, subject to the provisions of part I of the Interstate Commerce Act. hereinafter called the act, to provide additional rail service to the Lake Calumet Harbor Port at Chicago, Ill., now served exclusively by the Pullman division of the Chicago, Rock Island and Pacific Railroad Company (Rock Island).[2]

By application filed October 22, 1956, in Finance Docket No. 19538, the Kensington and Eastern Railroad Company,[3] the Illinois Central Railroad Company, The Philadelphia, Baltimore and Washington Railroad Company[3] and The Pennsylvania Railroad Company applied under section 1(18) of the act for authority to construct a line

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[2] In this report, as throughout the record, the individual railroads sometimes will be referred to by the distinctive names in each corporate title, or by the designation shown in parentheses.

[3] The Kensington & Eastern and the Philadelphia, Baltimore & Washington are non-operating companies. The former is owned by the Illinois Central, and the latter is leased by the Pennsylvania.

of railroad, approximately 1.431 miles, in Cook County, Ill. The initial segment of 2,900 feet, or 0.549 mile, would be constructed by the Kensington & Eastern at an estimated cost of $222,596; the next 630 feet, or 0.119 mile, would be built by the Illinois Central at an estimated cost of $35,886; and the final 4,030 feet, or 0.763 mile, would be constructed by the Pennsylvania in behalf of the Philadelphia, Baltimore & Washington at an estimated cost of $604,094. Each applicent is to finance its proposed construction from current funds available in their respective treasuries. The track will lead out from the westbound main line of the Kensington & Eastern at a point a short distance east of Doty Avenue and then extend east and north to a connection with the proposed track of Pennsylvania on land owned by the Pennsylvania. A portion of the Pennsylvania construction would be on property leased from the Chicago Regional Port District, hereinafter referred to as the Port District. The connection between the Illinois Central and the Pennsylvania segments would be at about 130th Street, and the Pennsylvania track, in turn, would connect with the track owned by the Port District.

In the same application, the Illinois Central, the Pennsylvania, and the Chicago South Shore and South Bend Railroad (South Shore) seek authority under section 5(2) of the act for the acquisition of trackage rights over the line to be constructed and certain existing tracks over which it is necessary to operate in order to reach the Lake Calumet Harbor Port, hereinafter sometimes called the harbor or port. The railroad properties of the Kensington & Eastern are leased to and operated by the South Shore. A crossover would be installed between the eastbound and westbound tracks of the Kensington & Eastern, immediately west of the connection with the track leading to the port, to enable trains coming to the harbor to cross from

the eastbound to the westbound track of the Kensington & Eastern to enter the track leading to the port.

By application filed April 25, 1957, in Finance Docket No. 19742, The Belt Railway Company of Chicago (Belt Railway or Chicago Belt)[4] requests authority under section 5(2) of the act to acquire trackage rights over the Illinois Central, the Kensington & Eastern, the South Shore, and the Pennsylvania from a point on its line at or near 95th Street to a point on the railroad tracks of the Port District on the west side of Lake Calumet Harbor, near 130th Street.

By application filed September 9, 1957, in Finance Docket No. 19921, The Michigan Central Railroad Company, The New York Central Railroad Company, and the Indiana Harbor Belt Railroad Company[5] applied for authority under section 5(2) of the act to acquire trackage rights on behalf of the New York Central and Indiana Harbor Belt over the lines of railroad owned or operated by the Illinois Central, the Kensington & Eastern, the South Shore, and the Pennsylvania leading to Lake Calumet Harbor Port.

A joint hearing on the applications was held at Chicago. The Board of Trade of the city of Chicago, the Chicago

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[4] Originally the Chicago Belt filed an application in Finance Docket No. 19391 for permission to construct a line of railroad to the property of the Port District. Upon motion of the Chicago Belt, its application to construct was dismissed without prejudice by our order dated January 25, 1957.

[5] These same three applicants have pending in Finance Docket No. 19448 an application under section 1(18) of the act for authority to construct a line of railroad from 126th Street to the Lake Calumet Harbor Port of Chicago. In view of our findings herein, the construction application pending in Finance Docket No. 19448 will be dismissed.

Association of Commerce and Industry, the Port District, the North Pier Terminal Company, the Calumet Harbor Terminals, the Packers Terminal Warehouse, and the Secretary of Agriculture of the United States intervened in support of the applications. The New York, Chicago & St. Louis Railroad Company (Nickel Plate), the Rock Island, and the Pullman Railroad Company[6] intervened in opposition. Unless otherwise indicated, all points hereinafter mentioned are in Illinois.

Jurisdiction.—On September 9, 1957, the interveners in opposition filed written motions to dismiss the applications in Finance Dockets Nos. 19538, 19742, and 19921 under section 5(2) of the act for trackage rights over lines of railroad proposed to be constructed to serve Lake Calumet Harbor. The motions pointed out that the applicants, among other things, requested approval and authorization of trackage rights over the various segments of tracks proposed to be constructed by the applicants. The substance of the respective motions is that we do not have jurisdiction under the act to approve and authorize trackage rights over track which are not in existence. Section 5(2), they state, relates only to tracks "owned or operated" by a railroad carrier, and not to tracks proposed to be constructed in the future.

The authority requested by the applicants under section 1(18) to construct a line of railroad, and under section 5(2) for trackage rights, constitutes a single plan whereby each of them proposes to provide additional rail service

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[6] Because of the fact that Pullman is controlled through stock ownership and operated by the Rock Island under lease, their joint interests and actions herein will be considered and referred to as those of the Rock Island which, along with the Nickel Plate, sometimes will be called the interveners in opposition.

to the facilities now located or hereafter to be located at Lake Calumet Harbor. Orderly procedure dictates that all applications required to effect the entire plan be heard simultaneously, particularly, as here, where the evidence to be presented in support of the construction and trackage rights is identical. Heretofore, we have authorized construction of a line of railroad and at the same time approved operation under trackage rights over the line to be constructed. See Finance Docket No. 18534, *Spartanburg Term. Co. Construction*, 295 I.C.C. 806 (not printed in full), decided July 10, 1957, and *Arkansas & L. M. Ry. Co. Construction*, 290 I.C.C. 112, decided October 23, 1953. To the same effect compare *City of Milwaukee* v. *Chicago & N. W. Ry. Co.*, 279 I.C.C. 521, and Finance Docket No. 15925, Northern Pacific Railway Company Et. Al. Trackage Rights, Etc. (not printed in full), decided September 28, 1948. In the light of the decisions cited, there appears no valid reason to require the applicants herein to approach the problem of providing additional service to the port in a manner other than has been presented by the pending applications. In our opinion, there is nothing in section 5(2) which restricts our jurisdiction to the consideration of applications covering existing facilities. The motions to dismiss the applications, therefore, will be overruled.

Objections to receipt of evidence.—At the opening of the hearing, counsel for the interveners in opposition objected to the introduction of any evidence relating to Lake Calumet Port traffic other than that moving in import and export commerce, on the ground that the scope of the various applications had been limited by certain pleadings filed in response to the intervening petitions on behalf of the Rock Island and the Nickel Plate. The purpose of the hearing was to develop all the facts pertaining to the public need for additional rail service to and from the

port. The facilities already established and to be established at the port are to be used extensively in the handling of domestic as well as import and export traffic, and there appears no reason for limiting the kind of service to be performed by the applicants in the event their applications are granted. As a general rule, we will not restrict or limit the type of service to be performed by a rail carrier subject to part I of the act. See *Northeast Oklahoma R. Co. Construction*, 252 I.C.C. 273 (285).

The Rock Island also contended that evidence dealing with rate matters had no place in these proceedings and should have been excluded by the examiner. General matters in regard to rates, while not necessarily of controlling importance, are factors which may be considered along with all the other evidence in determining whether the public convenience and necessity require construction of a line of railroad into a particular area.

Representations of the applicants.—Numerous reasons are advanced by the applicants in support of the general proposition that the proposed construction, and operation under trackage rights, would comply fully with the public convenience and necessity requirements of section 1, and the consistency with the public interest provision of section 5, respectively, of the act. It is urged that for various and sundry reasons the industries now or hereafter located in the area comprising Lake Calumet Harbor must have the many advantages and benefits of applicants' service for fruition of the plans envisioned and in the process of being executed, on schedule, by the Port District, and that the impelling need for the additional rail service at the port is due to the increased common-carrier traffic to become available for rail transportation upon completion of the St. Lawrence Seaway in 1959.

Contentions of the interveners in opposition.—The Rock Island and the Nickel Plate dispute practically every point advanced by the applicants in support of the applications. The Rock Island opposes the applications on the grounds, among others, that it is serving and will continue to serve adequately the Port District; that it proposes and is prepared to expend further sums of money to keep in a position to serve the port adequately; that it is capable of performing adequate service in the future to meet the rail transportation needs of the Port District; that it is entitled to retain the rail traffic of the Port District; that there is no reason sufficient in law for applicant's extension of their lines of railroad and operations to serve territory heretofore served exclusively and adequately by the Rock Island; that the expenditures of sums of money required to be spent by applicants to serve the Port District cannot be justified either in fact or in law; and that applicants' extension of their line of railroad and operations to serve territory heretofore served exclusively and adequately by the Rock Island cannot be supported by public convenience and necessity, could mean only a duplication of rail facilities, and would create unsound and uneconomic conditions in transportation.

It is the position of the Nickel Plate that, because it and the Rock Island can furnish complete and adequate railroad service to the east and west sides, respectively, of Lake Calumet, the various applications in this proceeding should be denied. The Nickel Plate states that the applicants have failed to file appropriate applications for authority, so that even if the pending applications should be approved, contrary to established principles of proof, the applicants would still not be authorized to operate within the Port District. We are of the opinion that the Nickel Plate's contention in this regard is meritorious,

and nothing herein is to be construed as authority to the applicants to operate over the tracks owned by, and located within, the Port District. The Nickel Plate can visualize nothing but general congestion, confusion, and a breakdown of transportation if the applicants are permitted to extend operations to the port area. Such contention will be considered more fully hereinafter in this report.

Principal issues of fact.—Whether the additional service proposed by the applicants through construction of a new line of railroad is required by the public convenience and necessity, and whether operation under trackage rights as proposed is consistent with the public interest present numerous issues of fact which must be resolved in large measure from conflicting opinion evidence of experts, all well qualified to speak concerning matters within their particular fields. Voluminous findings of fact and conclusions, 114 of which are by the interveners in opposition alone, many bearing upon the same issue, are requested. Discussion will be confined to those points which are considered essential to the proper disposition of the applications.

Applicants and proprietaries.—The Illinois Central serves 14 mid-America States with main lines extending from the shores of Lake Michigan to the Gulf of Mexico. The Pennsylvania operates in the industrial northeastern section of the United States, excluding New England. The population of the 13 States served by it comprises more than 40 percent of the total population of the Nation. The New York Central system is made up of approximately 11,000 miles of tracks situated in the northern and eastern portions of the United States and in the provinces of Ontario and Quebec, Canada. It parallels the St. Lawrence Seaway, and many of the important areas served by the

New York Central in Illinois, Indiana, Ohio, and Michigan will use the Chicago Port as an ocean gateway.

The Belt Railway is owned by the following 12 trunk-line railroads serving Chicago: The Atchison, Topeka and Santa Fe Railway Company, The Chesapeake and Ohio Railway Company, the Chicago & Eastern Illinois Railroad Company, the Chicago, Burlington & Quincy Railroad Company, the Rock Island, the Erie Railroad Company, the Grand Trunk Western Railroad Company, the Illinois Central, the Monon Railroad Company, the Wisconsin Central Railroad Company (operated by the Minneapolis, St. Paul & Sault Ste. Marie Railroad Company), the Pennsylvania, and the Wabash Railroad Company. The owner lines interchange cars directly with one another through the Chicago Belt facilities at Clearing Yard pursuant to the terms of an operating agreement entered into November 1, 1912. Under this agreement the 12 owner roads pay the cost of operating and maintaining the Belt Railway on a user basis. Regular tariff charges are applicable to other traffic handled by the Belt Railway. The Belt Railway has a direct connection with each of its owning railroads, and with all other road-haul lines operating into and out of Chicago. It also connects directly with all switching lines in the Chicago switching district, except those of the Chicago Junction Railway and the Chicago Produce Terminal Company.

Clearing yard is approximately 18.5 miles from the port. The operations of the Belt Railway fall into three main categories: (1) cars interchanged between owner lines; (2) cars interchanged between nonowner lines, or between Belt Railway owner lines and nonowner lines; and (3) cars switched for local industries. In 1954, the total number of cars handled by the Belt Railway was 1,829,526; in 1955, it handled 1,939,721 cars; and in 1956, there were

2,022,265 cars handled. The methods whereby cars are transferred via the medium of the Belt Railway are set out in detail in the record. At the present time, three classifications are made for the Rock Island: (1) at Clearing yard for pull by Rock Island power to its Burr Oak yard, approximately 12 miles from the port; (2) for industries in the South Chicago District, which the Chicago Belt delivers to the South Chicago yard and which is pulled from there by Rock Island power into its own adjacent yard; and (3) cars for the Pullman Railroad handled by Belt Railway from Clearing Yard to Pullman Junction and then into the Rock Island 97th Street Yard at a point immediately west of the north end of Lake Calumet.

Indiana Harbor Belt is one of the largest terminal switching carriers in the Chicago switching district. It operates 648 miles of track in Illinois and Indiana, and is owned as follows: 60 percent by the New York Central and 20 percent each by the Chicago and North Western Railway Company and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company. The Indiana Harbor Belt has direct connections at 63 different points with all 31 trunkline carriers serving Chicago.

The South Shore extends from its western terminus at the Randolph Street station of the Illinois Central to its eastern terminus at South Bend, Ind., approximately 90 miles. The trackage from South Bend to the Indiana-Illinois State line is owned by the South Shore. From the State line to Kensington station at 115th Street it is operated under a long-term or perpetual lease from the Kensington & Eastern. From the Kensington station to Randolph Street station, the operation is under a trackage agreement with the Illinois Central.

Rock Island facilities.—As a result of a sustained modernization program started in 1937, the Rock Island now

has an up-to-date physical plant capable of providing efficient railroad service throughout its entire system. Since taking over operations of Pullman on January 1, 1950, the Rock Island has made and is making many improvements and betterments in the Chicago division, and other improvements and betterments are planned. The recommendations for improvements on the Chicago division include several projects, costing nearly $500,000, in the Chicago and South Chicago Calumet area yards alone. The present capacity of those yards is 4,981 cars, which can be expanded to a total of 9,733 cars. The Rock Island's present entrance into the port area is from the south; it temporarily crosses Doty Avenue at grade because of highway construction in the vicinity, but the railroad is constructing a single track overhead entrance which may be expanded to two tracks later. This will be the Rock Island's permanent trackage into the Lake Calumet Port area from the south.

A track leading off the Pullman branch near 103d Street serves the garbage-disposal area at the northwest edge of Lake Calumet. This track crosses Doty Avenue near 107th Street extended. It is the plan of the Rock Island to adjust the route to serve the port area from the north and to connect into the Port District tracks which will parallel Doty Avenue on the west side of the lake. This connection would provide two-way service into the switching and service tracks of Lake Calumet Port.

No complaints of sufficient magnitude to be emphasized in the record have been made of Rock Island service to the industries at the port. This is particularly so since the filing of the applications when superior service with ample engines and crews was instituted and has been continued. Not only does the Rock Island have a flexible switching operation in the vicinity of the port, but its

entire terminal operation is geared to provide a constant flow of cars into and out of the area without interfering with the work being performed by the engines pulling and setting cars at dockside or at the various transit sheds, warehouses, and elevators. It is prepared to furnish such additional service as may be required in the area. A proposed new yard with a capacity of 412 cars would be constructed by the Rock Island in the vicinity of 124th Street which would be used for switching and classifying cars for delivery to various railroad connections and to the port industries. From the south entrance of this proposed new yard to the Port District tracks would be a distance of approximately 7,400 feet. The Rock Island states that its plans for serving the port have been revised from time to time as developments required, and that such planning will continue to be flexible so as to meet traffic needs as they arise. The Rock Island maintains direct interchange facilities with 15 trunkline carriers in the Chicago switching district.

The Rock Island operates approximately 7,600 miles of railroad lines in 14 States, serving vast areas and important gateways within the Midwest and Southwest. It is in a position to participate in volume traffic moving to or from the territory lying west of the Great Lakes and the Mississippi River to the Pacific Ocean and the Gulf of Mexico. In contrast to the position of some of the applicants herein, particularly the New York Central and the Pennsylvania, the Rock Island is complementary to and not competitive with the water route which will be responsible for development of additional future traffic at the port.

Nickel Plate.—The Nickel Plate's line into Chicago parallels the eastern side of Lake Calumet and is the nearest line of railroad to Lake Calumet on the east. Its Calumet

yard is located in the northeast side of the lake. All of the Nickel Plate's Chicago road trains and its interchange movements with other carriers originate and terminate at Calumet yard. Exclusive of the area now in use for enginehouse facilities, yard classification tracks, coach yard, cleaning, repair, and inspection tracks, there are 430 acres in this parcel.

The present capacity of Calumet yard is 1,909 cars. There is room on this parcel for the construction of 2 additional yards, each with a capacity of 2,000 cars, and, by rearranging tracks, the present yard could accommodate an additional 800 cars. This would give a total capacity of 6,709 cars on the parcel, with 300 acres left over. Between 87th Street and 93d Street, the Nickel Plate also owns land on which it could erect another yard with a capacity of 1,200 cars, giving it a total yard capacity of 7,909 cars. Without a doubt, the Nickel Plate is ideally situated to provide service to the northern and eastern sides of the lake.

Port District.—The Chicago Regional Port District, a political subdivision, body politic, and municipal corporation, was created by an act of the State of Illinois Legislature, approved June 6, 1951. The duties of the Port District, generally stated, are to study existing harbor plans and recommend improvements therein to meet changing business and commercial needs; to investigate and prepare plans for the development of the port facilities; to study and to make recommendations for improvement of terminal and other facilities for the promotion of commerce; to acquire, own, construct, lease, and maintain port and harbor, water, and land terminal facilities; and to perform other acts to improve the port facilities for the handling of commerce in and through the Port District.

In 1957, the law was amended to restrict the area of the Port District to property owned by it in Lake Calumet and a small amount of adjacent property. The Port District has the continuing power under existing law to borrow money for the purpose of acquiring, constructing, reconstructing, extending, or improving terminals, termnal facilities, and port facilities, for acquiring any property and equipment useful for such purposes, and for acquiring necessary cash working funds.

In furtherance of the powers granted pursuant to the statute, the Port District issued and sold $24,000,000 of revenue bonds, the proceeds from which have been used to construct its first-stage development, consisting of dredging Lake Calumet, particularly the turning basin and slip No. 1 to deepwater specifications, construction of docks, grain elevators, Port District office, warehouse, transit sheds, and 14 miles of railroad track. All of the aforesaid facilities have been completed. These facilities were designed for the handling, warehousing, and stopping in transit of domestic freight as well as import and export business. It is the declared policy of the Port District to attract and utilize the services of all rail carriers which have a primary interest in the development of the Lake Calumet Harbor as a rail-truck-barge-ship interchange harbor.

In the spring of 1955, the Port District procured a quit-claim deed to the bed of Lake Calumet from the city of Chicago, in return for which the Port District paid the city $250,000. An amendment to the Port District act provided that all the facilities which the Port District was empowered to create, as well as those which would be developed over a period of years, would, by law, be delivered into private hands for lease and operation. As a consequence, each facility in itself is a separate entity in the hands of a private operator.

The west side of Lake Calumet has been set aside for commercial purposes. At the present time the Port District has completed and has in operation two 6½-million bushel grain elevators, three transit sheds comprising 309,000 square feet of space, a backup warehouse comprising 200,000 square feet, and 14 miles of railroad yard "hold" tracks. Transit shed No. 1 is leased to the North Pier Terminal Company; transit shed No. 2 is leased to Packers Terminal and Warehousing Company, and shed No. 3 is leased to the Calumet Harbor Terminals. The backup warehouse has been leased to North Pier Terminal and Calumet Harbor Terminals. Elevator No. 1 is leased to the Illinois Grain Company, and the other elevator has been leased to the Rice Powell organization. These facilities are now served exclusively by the Rock Island, and all rail carriers reaching Chicago obtain ready access to them by the absorption of switching charges.

The "hold' tracks heading north behind the grain elevators within the Port District will accommodate from 250 to 300 cars. Those tracks, in part, will be called upon to meet the demands of both the inbound and outbound arrivals into the Port District. When those tracks are no longer able to accommodate the requirements of the elevators and sheds, additional trackage will be required. The additional trackage will not be constructed in the harbor area, because the Port District does not intend to make available any more hold yards as such in that area. It is not contemplated that additional hold tracks or storage-track facilities will be expanded, and any railroads serving the harbor area will be required to adhere to this physical requirement.

As for future development, the Port District hopes to inaugurate phase 2 of its development program, consisting of the dredging of slips 2 and 3 and the construction of

related structures on the southwestern and southeastern sides of the Lake Calumet, for a distance of some 3,500 feet, within a year from the date of hearing, for completion in 18 months or 2 years. It is the hope of the Port District to complete development of the entire west side of the lake for commercial purposes within 10 years.

Proposed lease agreement between the Port District and the applicants.—The applicants have submitted a proposal to the Port District to lease the tracks and other facilities now or hereafter provided for railroad purposes. The railroads would pay the Port District rental for their use, and, at applicants' expense, maintain such tracks and facilities and provide the switching service necessary on such tracks to meet the requirements of the tenants of the port. The applicants have agreed among themselves that they would jointly provide engines to perform the switching service required by all the railroads within the port, furnish the personnel to maintain tracks and facilities, provide switching service, and perform such other railroad work or service that may be required therein. Each of the applicant railroads proposes to bring its cars to the port and receive cars therefrom on designated tracks in the Port District yard, from and to which tracks cars will be switched for each of the applicants to and from industries within the port by engines provided for such service. Maintenance of the tracks and facilities and switching operations would be under the supervision of an officer selected by the applicants, who would report to and be governed by directions of a board of managers composed of one representative of each of the railroads which are parties to the agreement with the Port District authorities. The maintenance of the tracks and facilities and the switching operation thereon within the port would be conducted as a joint facility, and each railroad would

assume and bear a car-proportionate share of the expense incident to the maintenance and operation of such tracks and facilities, in the same ratio that the number of loaded cars brought to and taken from the port by each applicant bears to the total number of loaded cars of all railroads during each month. As the volume of business increases at the port and the applicants deem it advisable to lease or purchase the locomotives and assign them to service within the port, each of them would advance, in equal proportion, the purchase price of such locomotives.

The Port District further would agree not to permit any other person, company, corporation, or association to construct, lease, or operate railroad facilities on its property for the purpose of serving the Lake Calumet Harbor area, other than as presently covered by leases or contracts with the Pullman Company and the Philadelphia, Baltimore & Washington Railroad Company, except upon written approval from the applicants as lessees. We are of the opinion that this provision of the proposed lease agreement between the Port District and the applicants is objectionable because it would tend unduly to restrain competition. For this reason the condition should be eliminated. Additional service to the port area should be governed by the public convenience and necessity evidenced by a certificate from us upon appropriate application, and such additional service is not a question within the province of the applicants or the port authority, individually or collectively, to determine. Section 4 of the proposed agreement provides, among other things, that the Port District should provide such additional land and construct such additional tracks and facilities as may be requested by a majority of the applicants and add the cost of same to the valuation base on which the applicants would pay rental under the agreement. The applicants would agree, at their sole cost and expense, to operate the

property as a joint facility and to maintain it and to furnish railroad service adequate to meet reasonable and practical requirements of industries which are tenants of the Port District. The applicants would agree to permit other railroads having physical connections with the property to become parties to the proposed agreement upon receipt of a written application from such other railroads, provided those railroads would agree to be bound by the terms and conditions of such agreement in the same manner as though they had been original parties to it.

The property would be leased to the applicants for an annual rental based on 5 percent of an agreed current valuation, provided that the total rental, payable in any calendar year, should not exceed an amount equivalent to $2 per car, loaded or empty, or locomotive handled to or from the property during such calendar year. The contract of lease would run for 20 years, with the option in the applicants for a renewal for four additional terms of 20 years each, on the same terms and conditions.

The joint-facility agreement.—The proposed joint-facility agreement was subscribed to in principle by all of the applicants on September 4, 1957. In and by the terms of the agreement, the applicants agreed among themselves, among other things, to perform all switching within the port properties under a joint-switching arrangement. Each applicant would furnish a diesel switching locomotive for 1-year periods, in rotation. Additional locomotives would be furnished in rotation, if required. Members of the engine and switching crews were to be selected from employees of the railroads. The applicants severally would perform track or other maintenance work and provide wrecking service on the port property. Following the initial development period, a manager would be appointed who would have charge over the operations of the rail-

road service on the port property. Each of the railroads would deliver its inbound cars to and receive its outbound cars from the Port District yard facilities which are to be leased and operated by the applicants as a joint-switching facility. All funds required for any facilities which the applicants might be required to provide would be funds advanced in equal proportions by each of them, and each railroad would have an undivided interest in such facilities with each of the other railroads. All other costs and expenses incident to the joint arrangement would be allocated on the basis of use.

Trackage agreements.—Trackage agreements were entered into by applicants on various dates providing for the use by each of them of some of the tracks of the other applicants. The Illinois Central granted the Pennsylvania bridge rights over its main line between the junction with the Chicago Belt tracks at 95th Street, or the junction with the Pennsylvania tracks in the vicinity of Riverdale, and the junction with the Kensington & Eastern tracks near Kensington.

The Illinois Central, the South Shore, and the Kensington & Eastern have entered into an agreement, allowing the Pennsylvania bridge rights over the tracks of the Kensington & Eastern between Kensington and a point immediately west of the Calumet River. The Illinois Central has also entered into agreements granting the Pennsylvania and the South Shore bridge rights over the tracks which it proposes to construct between the junction with the Kensington & Eastern tracks and the junction with the tracks of Pennsylvania, immediately west of the Calumet River, in the vicinity of 130th Street. All of these agreements are for the purpose of allowing the Pennsylvania to reach its property immediately west of the Calumet River.

In addition, the Illinois Central and the South Shore have entered into agreements with the Pennsylvania granting bridge rights over tracks of the Pennsylvania west of Calumet River, connecting tracks of Illinois Central, and those of the Port District.

Agreements have been entered into by the Chicago Belt, the Illinois Central, the Kensington & Eastern, the South Shore, and the Pennsylvania, enabling the Chicago Belt to reach the property of the Port District by means of bridge rights over tracks of the Illinois Central from an existing connection of the Belt Railway with the Illinois Central tracks near 94th Street at Greenwood Avenue thence southerly on the Illinois Central tracks to Kensington, thence over the Kensington & Eastern tracks from Kensington to a point east of Doty Avenue, where a new track is to be built by the Kensington & Eastern to a junction with a new track to be built by the Illinois Central to connect with a track to be built by the Pennsylvania at the north side of 130th Street, just west of the Little Calumet River, thence over such Pennsylvania track to a connection with the tracks of the Port District.

The Illinois Central, the Kensington & Eastern, and the South Shore have also entered into contracts with the New York Central (lessee of the Michigan Central) and the Indiana Harbor Belt, under which the two lines last named are granted bridge rights jointly with other lines, as a tenant of the Illinois Central, over the tracks of the Kensington & Eastern from the junction of its tracks with those of the Michigan Central, near 124th Street, to the junction of its tracks with those of the Illinois Central east of Doty Avenue and west of the Calumet River. The Illinois Central granted a joint bridge right for the use of its tracks extending to the tracks of the Pennsylvania on the west bank of the Calumet River north of 130th

Street, from which point these two roads, under agreement with the Pennsylvania, will use the Pennsylvania tracks to reach the tracks owned by the Port District.

These contractual arrangements have been made among the applicants with respect to trackage and bridge rights to reach the Port District tracks. The trackage to be used by the applicants will be multiple on the Illinois Central to Kensington, and double tracks from Kensington to the junction with the track leading off the Kensington & Eastern to the port. The track to be constructed will be a single track leading out of the elevated westbound main line of the Kensington & Eastern in an easterly direction to grade and then north under the present bridge spanning the Calumet River at 130th Street, thence north to the connection with the track to be built by the Pennsylvania. This single track will then extend in a northerly direction along the west bank of the Calumet River, thence northwesterly across the property occupied by the Calumet Harbor Terminals, Inc., and owned by the Pennsylvania, to a connection with the Port District tracks. The main-line tracks of the Illinois Central and the Kensington & Eastern are block signaled, and the junction at Kensington is protected by interlocker. The switches on the crossover between the two main tracks of the Kensington & Eastern and the connection with the single track leading down into the port will be operated by remote control.

All of the trackage agreements provide, among other things, that the right granted to use the tracks would be for the purpose of enabling the user to deliver and receive its freight traffic moving under its motive power in road haul or switch service to and from tracks as may now or hereafter be located within the area of the Port District, but, under the terms of the agreement, the user would have no right to use such tracks to deliver or receive any

freight traffic to or from any industry presently or thereafter served exclusively by the owner of the track. The engines, cars, and trains of the user would move over the track or tracks designated by the owner carrier from time to time for such movements. Such tracks would at all times be under the control and management of the owner carrier and its duly authorized representative, and operations would be conducted on schedules and in accordance with orders and regulations prescribed by said representatives.

Trackage charges.—The agreements as originally executed provided for the following charge per car, loaded or empty (with one count for each diesel locomotive unit but no count for cabooses): For use of the Illinois Central main line $2; for the use of the Kensington & Eastern $2; for the use of the Illinois Central extension 25 cents; and for use of the Pennsylvania extension $2.50. Provision was made for reducing the charges for use of the Illinois Central main line and the Pennsylvania facilities by 50 percent after 7,000 car counts per year. The charges were predicated on the amount of business anticipated at the time the agreements were drawn. However, evidence introduced at the hearing was to the effect that the amount of business previously anticipated was grossly underestimated, and that it now appears to applicants that a satisfactory revenue can be obtained by counting only loaded cars and locomotives, with no charge for cabooses, and no reduction of charges after 7,000 cars per year. Amended agreements to carry out this change have been filed with us since the close of the hearing.

Counsel for the Rock Island contends that the expense represented by charges for trackage rights and other charges involved in the operation by the applicants into the port will exceed the revenues to be derived from such

service under applicable tariff provisions, and that we should not authorize an operation which can only result in deficits insofar as the applicants are concerned. The record shows that if direct service by the applicants to the port is permitted, the line-haul business, without doubt, will provide profitable operations for the applicants. As for the crosstown switch service, the charges to be assessed are indefinite, and no doubt will be adjusted to cover actual costs for the service provided. We are convinced, on this record, that the service to the port proposed by the applicants will not be improvident.

Applicants' plan of operation.—Witnesses on behalf of the applicants emphasize the fact that a large port handling oceangoing traffic cannot efficiently operate unless adequate supporting rail facilities are available. The combined yard capacity of the applicants is 61,601 cars, or more than 12 times that presently available to serve the port through the Rock Island. The Kensington yard of the New York Central is located 1.5 miles from the port. It has a present car capacity of 792, but space is available to install tracks to accommodate more than 2,000 additional cars. The total running time from the Kensington yard to the port would be about 20 minutes. Under the plan, trains of the applicants would be on the tracks of the South Shore for approximately 5 to 8 minutes. Because Kensington yard is immediately adjacent to the port facility, in the event of overtaxing of the Port District yard, it would be made available for use by all railroads entering the port.

The Illinois Central proposes to serve the port with its own trains from its Markham yard via its tracks to the junction with the Kensington & Eastern at Kensington, thence over the Kensington & Eastern and the single lead track to be constructed into the Port District yard. As

time or the occasion may require, service would also be made from the Wildwood yard over a portion of the same route. It would be necessary to use the crossover from the eastbound main track to the westbound main track of the Kensington & Eastern to reach the single lead track to the port.

The Wildwood yard of the Illinois Central is 3.8 miles and 35 minutes running time from the port. It has a capacity of 1,300 cars, which could be expanded to 4,000 cars. Markham yard of the Illinois Central is 9 miles from the port, and the running time in each direction is approximately 1 hour. Its present car capacity is 9,050, and there is room available to expand to 13,300. Hawthorne yard, capacity 550 cars, is 23.5 miles and Congress Street yard, capacity 800 cars, is 16.3 miles from the port. Traffic from the west destined to the port would move through Hawthorne yard to Congress Street and from there into the port with a running time of 3 hours. If a complete trainload from the west is destined to the port, it would move in much less time directly from Hawthorne to the port without being set out at Congress Street or Wildwood. Under the proposal, cars of the Illinois Central would be spotted at the port on the same day, or within 24 hours after arrival at Chicago.

The Pennsylvania has two main trunklines serving Chicago. First, the line from Chicago through Fort Wayne, Ind., to Pittsburgh, Pa., and, secondly, the so-called Panhandle line through Logansport, Ind., to points south and east thereof. Within the Chicago switching district, the Fort Wayne line and the Panhandle line are connected at 3 places. The Pennsylvania has 3 major freight yards and 6 other supporting yards in the Chicago area.

The Pennsylvania expects to serve the port area initially from Dolton yard, capacity 570 cars, expandable to

1,000 cars, located on the Panhandle line due south of the port area at 159th Street. Except for the connection with the Illinois Central at Riverdale, the route from Dolton yard to the port is over main tracks with signals and interlockings. The total distance is 9.3 miles, and the running time would be about 1 hour. If volume and service necessitate additional Pennsylvania operations to the port, it could also be served via the Fort Wayne line, the Chicago Belt, the Illinois Central, and the Kensington & Eastern from Colehour yard, capacity 1,743 cars, expandable to 2,500 cars. The distance from Colehour yard to the port over this route is 10.9 miles and the running time about 1½ hours. The location of existing Pennsylvania facilities with respect to the port area would make it possible to integrate the traffic to and from the port into its existing schedules, and the only additional crews required would be those to move the traffic in either direction between the port, on the one hand, and Dolton or Colehour yards, on the other.

The New York Central has three trunklines entering Chicago. The northern district (Michigan Central) passes through Gibson yard and terminates at Kensington yard, approximately 1.5 miles west of the port. The southern district (Big Four) enters Chicago over the Illinois Central's route from the south and moves over the Illinois Central tracks west of Kensington yard. The western district is the New York Central line near Lake Michigan which includes, from south to north, Indiana Harbor, South Chicago, and Englewood yards, and terminates at La Salle Street Station. The yards which the New York Central proposes to use for Port District business are 4 in number with a combined present car capacity of 5,187, and all are within a distance of 20 miles from the port.

Inbound grain shipments are inspected at the Gibson yard on the Indiana Harbor Belt, located approximately

10 miles from the port. Gibson yard has a capacity of 6,260 cars and there is enough space available for an expansion of a total of 7,760 cars. The principal means of handling traffic of New York Central trains in service to the port are as follows:

1. Cars would be classified at Elkhart, Ind., and set out at Gibson, then moved to Kensington and into the port yard. Facilities recently placed in operation at Elkhart have reduced the detention time of cars held for classification from 24 to 8 hours.

2. Cars classified at Elkhart could be taken, if the volume warranted, directly to Kensington and then to the port yard.

3. If the volume was sufficient, cars at Gibson would be moved direct to the port yard.

4. Cars in Englewood yard, about 19.5 miles from the port, would be taken either to the Chicago Junction, Ashland Avenue, or Leavitt Street yard and then taken by the Chicago Junction to Kenwood and south over the Illinois Central to Kensington yard and then by the New York Central to the Port District yard.

5. Cars in the South Chicago and Indiana Harbor yards ordinarily would be moved to Gibson, then to Kensington, and finally to the port yard. The movement from the Kensington yard to the port would be via a connection of the Michigan Central with the Kensington & Eastern in the vicinity of Kensington, thence over the latter to the track leading into the port.

There are 7 main yards, having a total present car capacity of 17,246, located along the line of the Indiana Harbor Belt. Of these yards, 5, having a capacity of approximately 15,000 cars, are located less than 20 miles from the port. The Indiana Harbor Belt has access to the

Kensington yard of the New York Central. It also has trackage rights from the Kensington yard across the Kensington & Eastern to a connection with the Pullman division of the Rock Island. The Indiana Harbor Belt proposes to handle the business in its own trains to and from the port by using yard facilities at Kensington. This business would be handled to the Kensington yard over joint Michigan Central-Indiana Harbor Belt tracks from Gibson.

The Blue Island yard of the Indiana Harbor Belt is the point of receipt for all western line cars and the point of delivery to all eastbound and southbound carriers. Movement of trains from the Kensington yard to the port would be the same as for the New York Central. If movements were to be made direct from Gibson yard to the port, the trains would move over the Michigan Central to its connection with the Kensington & Eastern, thence into the port.

Movements to the port under the proposed trackage agreements would be handled by the Chicago Belt over Belt Railway tracks from Clearing yard, capacity 10,673 cars, to an existing connection with the Illinois Central tracks at Burnside, near 94th Street and Greenwood Avenue, thence southerly on the Illinois Central freight tracks to Kensington, thence over Kensington & Eastern tracks from Kensington to a point east of Doty Avenue, where the new track is to be placed to connect with the tracks of the Pennsylvania at the north side of 130th Street just west of the Little Calumet River, thence over the Pennsylvania tracks to a connection with the tracks of the Port District. In the event of congestion at the port, Belt Railway cars could be held at Cragin yard, capacity 1,000 cars, or its 22d Street yard, capacity 1,400 cars. The running time from Cragin yard to the port is estimated at approximately 3 hours.

The South Shore is the only applicant that would approach the port lead track from the east. The Port District would be served by the South Shore in its own trains from Burnham yard, approximately 4 miles from the port. Burnham yard has a present car capacity of 400 cars, which could be expanded to about 750-car capacity. Service to the port would be made by means of the lead track extending from the westbound main track of the Kensington & Eastern into the port.

Movements from the port by the separate trains of the applicants would traverse the same routes taken by the trains of the same applicants to the port.

The method proposed by the applicants to reach and serve the port is the same as used in other similar areas. It is a common operating practice and is economical as well as practical. The joint-facility plan has many advantages, in that the switching operations required on the part of all the railroads within the port may be coordinated and performed by a joint switch engine or engines under the supervision and direction of the person so designated by the applicants without favoritism or discrimination. By the joint arrangement, cars of each of the railroads, as and when required by industries, could be placed at one spotting. There would be no duplication of switching, resulting in substantial saving in time and money, as cars would be loaded or unloaded more quickly and would be handled into and out of the port with greater dispatch than if all railroads in the port did their own switching.

Feasibility of applicants' proposed operations.—Interveners in opposition contend that the proposed operations of the applicants into the harbor area would create delays, congestion, and confusion in the movement of cars

to and from Lake Calumet Port. They state that all movements by the applicants to and from the port would necessitate the use of tracks now handling a considerable volume of freight and passenger traffic, thereby increasing the density of traffic on and restricting the use of the tracks now in service, the crossing of tracks and public highways at grade, operation through interlocker plants, backup movements, and the use of a single port-entry track under the 130th Street bridge with an undesirable curvature of 20 degrees, all of which would make impossible a coordinated and practical operation for the applicants into the port. Interveners in opposition point out that at present only 10 tracks are available in the port area to handle the additional traffic moving via direct haul by the applicants to and from the harbor, and that the number of such tracks is insufficient to accommodate the service applicants propose to provide. They insist that the present time schedule for trains moving over the South Shore is entirely too tight to permit the 24 additional operations, consisting of 2 trains a day in each direction by each operating applicant, to be coordinated in a manner so as to avoid overcrowding not only the yard tracks on the Port District property but also the single track leading into the port. The record shows that, if the applications are granted, the movements over the applicants' proposed route into the port will be more direct and will not involve occupation of the South Shore tracks for a longer period of time than at present. Direct delivery by the applicants entails less handling and, being in control of the entire movement to and from the port, applicants would be in position to expedite the shipments as the occasions demand. The proposed operations also would be less expensive because of the elimination of the switching charges now absorbed on a line-haul traffic. The physical characteristics of the line and port yard referred

to by the interveners in opposition would not seriously interfere with the scheduled program of train operations contemplated to and from the port by the applicants.

Metropolitan Chicago.—The Chicago metropolitan area embraces 3,617 square miles, and includes 5 counties in Illinois and 1 in Indiana. In addition to the city itself, the area contains approximately 180 suburban or satellite communities with a total of 14,500 manufacturing establishments employing some 2,800,000 people. The present population of the area is 62,250,000, which is expected to increase to approximately 7,900,000 persons by 1980.

During and since World War II, Chicago has had a tremendous expansion in industrial activity. Its manufacturing facilities produce a diversified assortment of commodities, the more important of which are iron and steel, machinery, fabricated metals, communication equipment, petroleum and coal products, electronic and railroad equipment, farm machinery, housewares, meat products, confectionery products, electrical appliances, and cosmetics.

Port of Chicago.—Under this classification, the Corps of Engineers of the United States Army has included Chicago Harbor, the Chicago River (main and north branch), the Chicago River (south branch), the Chicago Sanitary and Ship Canal, the Calumet-Sag Channel, Lake Calumet, and Calumet Harbor and River. Development of the Great Lakes-St. Lawrence Seaway Project will permit many of the oceangoing vessels of the world to enter the Great Lakes and dock at the port of Chicago.

The Calumet-Sag Channel was constructed as a drainage outlet for the Calumet area. It is a valuable navigation channel of such importance that the U.S. Government is in the process of widening it from 60 to 225 feet. This channel connects the Port District facilities and Lake

Calumet with the Chicago Sanitary and Ship Canal at Sag Junction, and provides an adequate channel connection between the Great Lakes and the Mississippi River system. The project is scheduled for completion in 1961, although much of the widening already has been accomplished.

Lake Calumet Port is the major deepwater port facility of the port of Chicago. It is the heart of the Chicago railroad switching district, and is contiguous to major arterial highways. Port District facilities and industries have unparalleled access to barge, rail, lake steamer, and motor transportation, and in the immediate future there will be complete access to ocean transportation.

The port of Chicago has been and will continue to be the major Great Lakes general cargo port insofar as export and import shipments are concerned. Also, beginning with the 1959 shipping season, that port will become a dominant export gateway for grain moving both direct to ports abroad and in some instances to Montreal for forwarding abroad.

Growth of Chicago as an international port.—The first steamship company established regular overseas service between Chicago and European ports in 1933. In 1950, 80 vessels called at the port of Chicago, and, during 1956, 21 foreign lines made a total of 264 calls at the port. Export and import overseas traffic increased from 87,128 tons in 1950 to 237,206 tons in 1956. In addition, during the year 1955, 477,669 tons of traffic imported from Canada moved through the port of Chicago and 1,122,160 tons moved through the port for exportation to Canada. The total waterborne traffic from and to the port of Chicago for the year 1955 was 71,490,510 tons, including overseas and Canadian export and import traffic as well as water-

borne domestic traffic moving on the Great Lakes and on the Illinois waterways.

Position of the Port District.—The policy of the Port District, as evidenced by a resolution adopted January 15, 1954, is that the public interest as well as the interests of prospective tenants and users of the Lake Calumet Harbor will be best served by making available to them all accessible railroad service on an equal basis, and under no circumstances that a monopoly or exclusive privilege shall be granted to any single railroad carrier to serve the Lake Calumet Harbor. Furthermore, it is the declared policy of the Port District to foster and attract railroad carriers which have a primary interest in the development of the harbor as a rail-truck-barge-ship interchange port.

The Lake Calumet Harbor area presents one of the greatest potentials for the generation of traffic in the midcontinent area of the United States. The facilities at the port were designed not only to handle import and export business but to serve as an intermediary for stopping in transit, and for warehousing. The major portion of the present facilities is being used for the interchange of intrastate and interstate business rather than import or export. The port is a public harbor open to all trucking companies, barge lines, and steamships. The addition of more railroads would in and of itself be a benefit and would improve conditions at the port, because the contact with more than one railroad would give the Port District greater availability of one- and two-line switches rather than the three-line switches it now has.

Need for additional rail service.—The Port District's reasons for seeking additional railroad service into the Lake Calumet area are (1) it wants more single-line rates and more two-line rates and the service resulting therefrom; (2) the Port District would have available a much

larger supply of cars to handle the traffic destined to and from the port; (3) if, as now, the Rock Island alone served the port, the possibility of disruption in service because of labor differences or cessation of operation due to other causes would be enhanced. The Port District wants all the rail service that it is possible to secure for the public facilities now or hereafter to be located at the port, because such service not only will be advantageous to the tenants at the port but is considered essential for the proper overall development of the property. Emphasis is placed on the public nature of the facilities located at the port and their need for fast, dependable, and more abundant rail service than would be required by a single industry on one line of railroad.

Estimate of future traffic.—Applicants are of the opinion that, based upon conservative estimates of the port general manager, the rail traffic to and from the Lake Calumet port during the coming year would be approximately 27,000 carloads, which could easily increase to 76,500 carloads a year by 1962, to possibly 115,000 carloads a year by 1968 when the entire east side of the lake is expected to be fully developed, and to anywhere from 250,000 to 350,000 carloads a year when both sides of the lake are completely built up. Interveners in opposition question the accuracy of such estimates. They state that, because of the numerous imponderables involved, the rate of development of the port itself is indefinite, and that it is impossible to predict, with any degree of certainty, the volume of traffic which may be expected to move via the improved Calumet-Sag Channel and the St. Lawrence Seaway to the port of Chicago, much less to make an allocation of such traffic among the various subports, including Lake Calumet.

Some indication of future traffic through the port may be determined from the business generated in the immedi-

ate past. At the time of the hearing the port had been in operation for a relatively short period. Witnesses for the operators of the facilities at Lake Calumet Harbor were unanimous in forecasting material increases in the tonnages for the future. The present facilities at the lake are not expected to be utilized to capacity for several years, and large additions are planned for early construction. It is imperative, therefore, that at the very beginning of this new era of development a plan and system for handling the transportation needs of the port be established which will assure the type of service that is expected and will provide for steady progress and expansion. Admission of the applicants to the area will supply such needed service.

There are a number of factors to be considered in determining the amount of traffic which will be handled by lake ports generally, by Lake Michigan ports, by the Chicago Port, and finally by Lake Calumet Port. These factors include, among other things, the length of the navigation season on the Great Lakes, estimated to be some 7 or 8 months each year; the physical condition of navigation which restricts operations and makes for hazards and delays; the effect of tolls upon the volume of traffic; the limited capacity of the Welland Canal; the potentialities of a two-way cargo suitable for carriage in line vessels; severity of competition existing between Great Lakes ports and ocean ports; preservation of existing channels of exports and imports, including opposition to rates which would equalize Great Lakes ports with seaports; competition between water carriers operating on the St. Lawrence Waterway, on the one hand, and other modes of transportation operating between mid-America and ocean ports, on the other; efficiency of operation of Great Lakes ports to overcome the established pattern of movement of exports

and imports already established to and from ocean ports; the high cost of vessel operation through the St. Lawrence Waterway as compared with transportation to and from ocean ports; and, finally, political, military, and economic conditions at home and abroad.

The Middle West is a large processor and consumer of many items of foreign origin which can move by steamship to Lake Calumet, thence by rail to final destination. Examples of just a few commodities in this category are canned and processed seafoods from Norway, Spain, and Portugal; woodpulp, wallboard, and paper from Sweden and Finland; dairy products from Denmark, Holland, Belgium and France; olives and olive oil from Italy, Spain, and the areas around the Mediterranean; cork from Spain, Portugal, and North Africa; beer, wine, and other liquors from France, Germany, Holland, Denmark, and the United Kingdom; and automobiles from Germany, France, Italy, and the United Kingdom.

Likewise, the importation of basic raw materials for processing and consumption within the United States is of considerable magnitude. To mention but a few such items, tin is imported from Bolivia and the Far East; chrome ore from Turkey, India, and Cuba; manganese ore from Brazil; asbestos from Africa and eastern Canada; iron ore from Venezuela and eastern Canada; mahogany logs and lumber from Africa, the Philippine Islands, and Central America; sisal fiber from Africa, the West Indies, Central America, and Mexico; green coffee from Africa, South America, and Central America; cocoa from Africa and South America; jute and burlap from Pakistan; crude rubber from the Far East; and peat moss from Germany and Holland. Some of these items are now moving through Lake Calumet Harbor, and this area, in time, should handle all of them.

Approval of the instant applications would enable applicants to afford importers and exporters of these commodities fast and efficient transportation service to the facilities at Lake Calumet Harbor, and would enhance the volume of international traffic through the port of Chicago.

Great Lakes overseas freight conferences.—Three steamship conferences, operating under the Federal Maritime Board Authority, as required by section 15 of the Shipping Act of 1916, have a present membership of 14 steamship lines whose vessels are regularly engaged in direct operations between Great Lakes ports and the United Kingdom ports, the Scandinavian-Baltic ports, and the various ports within the Bordeaux-Hamburg range. Based on past experience in many American ports, the member lines definitely are of the opinion that Lake Calumet Port requires additional direct railroad connections to provide both increased cargo interchange facilities as well as access to a greater volume of inbound and outbound cargo that will justify the operation of larger vessels.

The cargo market, which the Great Lakes Overseas lines must serve through the port of Chicago in order to make operation of the larger vessels into and out of that port compensatory, includes the westerly limits at Salt Lake City, the southwesterly limits deep into Oklahoma, the southerly limits at Memphis, and the southeastern limits well into Tennessee. The lines already have active cargo operations through Milwaukee, Green Bay, Muskegon, Detroit, Toledo, Cleveland, Buffalo, and Oswego.

At the time of the hearing, by reason of canal and lock limitations in the upper St. Lawrence, the conference lines were restricted to vessels not exceeding 258 feet in length overall. These vessels, although capable of deeper loading, could not be loaded below the 14-foot mark for pas-

sage through the present St. Lawrence locks eastbound and westbound. These little ships have a maximum capacity of 180,000 cubic feet and, when loaded with what would be regarded as a well assembled cargo, can receive up to 1,600-weight tons down to a draft of 14 feet. On outbound voyages these ships on arrival at Montreal can load 6 to 8 feet additional draft, giving them a full cargo of 2,600 to 2,800 tons.

When the St. Lawrence Seaway, with locks 800 feet long, is opened for the 1959 navigation season, and a draft of 27 feet is made available all the way from Montreal into the principal Great Lakes ports, there will be an important change in the size and capacity of the vessels engaged in Great Lakes overseas cargo transportation.

Whereas under the conditions described the ships could not exceed 258 feet, the expectations were that beginning April 1959 the carriers using the enlarged St. Lawrence Seaway will be able to operate vessels about 400 to 450 feet in length. Against the present maximum cargo capacity of 180,000 cubic feet, the larger ships will have space for dry cargo totaling 350,000 cubic feet. In addition, they will have deep tanks ranging to about 15,000 cubic feet and space for 30,000 to 35,000 cubic feet of refrigerated cargo.

With the improved seaway in operation, there will be more steamship lines operating in the Great Lakes overseas trade, which definitely indicates a need for access to a greater number of importers and a greater number of exporters if these more numerous and larger ships are to obtain cargo in sufficient volume to make their voyages compensatory. On the basis of an average of 40 cars to a thousand tons of freight, the larger vessels with capacity of 8 or 9 thousand tons will require about 350 cars

coming in and 350 cars going out for each ship. When shed No. 1 is operating at capacity, with pier facilities serving 5 ships simultaneously, there will be a demand for 1,750 cars each inbound and outbound daily. Applicants and proprietary lines have a car supply equal to 30 times that of the Rock Island.

Scheduled sailings into and out of the port of Chicago during the 1957 navigable season increased almost 20 percent over the comparable period for 1956. The import picture reveals an increase from 41,964 net tons in 1952 to 115,791 tons in 1956. Exports from the port of Chicago have progressively increased year by year. In 1952, the port of Chicago exports totaled 51,369 net tons, while for the 1956 navigation season the export total was 121,415 net tons. The latter figure could have been substantially greater had there been a greater supply of small and suitable vessels available for operation in the Great Lakes overseas trade.

When the seaway is in operation, it will no longer be a question of vessel supply. The world merchant marine presently has slightly over 6,000 vessels that can navigate the enlarged St. Lawrence Seaway. These vessels total more than 25 million deadweight tons. If only 5 percent of these ships (approximately 300 vessels) came into the Great Lakes, making 2 to 3 trips a year, there would be 600 to 900 vessels coming into the port of Chicago each season. An efficient, economical interchange of cargo between the land carriers and the water carriers for such a volume of shipping will necessitate a substantially broadened railroad service into and out of the Lake Calumet port.

The larger general-cargo-carrying ships that will be coming into the Lake Calumet port will represent a capital investment ranging from $2,750,000 up to $5,000,000 per

vessel. The loss of a single day in the turnaround of such a vessel is an important item of cost. A continued bad turnaround experience can cause a ship operator to undertake to divert cargo to some other port where a better turnaround experience is assured. While such bad experience can be made up by higher ocean freight rates, such a practice could readily put a port out of competition.

All charter parties contain a layday clause, which is the number of days the owner of the vessel agrees to make the vessel available for the receiving of cargo without charge. If the period of the layday clause is 5 days, from Monday through Friday, and the vessel did not arrive until Friday, it would be entitled to expect its cargo from the charter on Friday. This would result in an accumulation of cars to the extent of that cargo. All export freight requires a good staging arrangement of cars so as to feed the freight to the ship as required.

In international shipping operations, the traditional pattern is for vessels to load their cargoes at several ports and to discharge their cargoes at several ports. The continuity of ship loading and unloading is vitally requisite to maintenance of minimum turnaround time in port, and adherence to sailing schedule necessitates highly fluid railroad service for the delivery of export cars as required for the loading pattern and the placement and movement away from the port of import cars.

Good, efficient, and prompt service is always important in general business, but in the field of international commerce it is mandatory. Many overseas sales transactions are made on what are called letters of credit. For example, a buyer in France places an order for goods with a Chicago exporter and to cover the sale arranges with a French bank to place a sum of money in a Chicago bank, which the latter is to pay to the Chicago seller when the

seller surrenders to the Chicago bank a steamship bill of lading showing that the goods in question are aboard a certain vessel. Such letters of credit almost invariably bear an expiration date and, if the goods are not aboard the ship or a steamship bill of lading has not been issued prior to such date, the Chicago bank will not pay the seller the money called for in the letter. Much inconvenience and sometimes loss of money to the seller is the result. To avoid responsibility for such situations, the railroads must exercise every effort to make delivery of goods entrusted to them at the dock in advance of the expiration date. Obviously, if the initial line or the inbound road-haul carrier can make such delivery direct to the steamship docks over its own rails without interchange with any other line, it would be in position to render the fastest possible service.

The same type of fast service is demanded by international traders on import traffic. The railroads, however, cannot move such freight until it has cleared customs. When the inland carrier is finally in position to move the freight, it is urged to do so with the greatest possible dispatch. This can be accomplished by furnishing empty equipment promptly upon availability of the freight and by moving it with the greatest speed that conditions permit with the least possible number of yard handlings.

Department of Agriculture.—The Secretary of Agriculture of the United States is interested in these proceedings in a dual capacity, first, by reason of the statutory mandate directing him to assist in improving transportation services and facilities for agricultural products and farm supplies in connection with rates, charges, tariffs, et cetera, and, secondly, as a shipper in having adequate port facilities available for possible exportation of Government-owned agricultural products, principally grains.

The seven States of Indiana, Illinois, Iowa, Missouri, Kansas, Nebraska, and Colorado, by virtue of their relatively close geographical location to the port of Chicago, will export, from all indications, a very substantial quantity of grain through that port. In 1956, this area produced 43 percent of all the wheat and 51 percent of all the corn grown in the United States. Substantially lower inland rates are in effect to Chicago from the producing points than are applicable to either the Atlantic or gulf ports. A comparison of the respective rates at the time of the hearing indicates that Chicago has a lower rate of 6 cents per 100 pounds on wheat shipped from Hutchinson, Kans., than is in effect in New Orleans, La., and 26½ cents per 100 pounds lower rate on corn from Des Moines, Iowa, origins. With respect to North Atlantic ports, the rate to the lowest rated port is uniformly 32½ cents per 100 pounds over Chicago on both wheat and corn. In view of the existing disparity in rates, much gain may be expected to be diverted from Atlantic and gulf ports for movements via Chicago and the St. Lawrence Seaway, particularly since much of the export tonnage is destined to points in Europe. The benefits that should accrue to the grain shippers in the Midwest as a result of the favorable location of Chicago with relation to the producing areas and the foreign markets could be nullified if insufficient transportation facilities to the dockside for large volumes of grain are not available. In this connection, service by a single railroad does not appear adequate for a major port, especially since most western railroads serving the midwestern grain-producing States terminate at Chicago and have very extensive switching and classification yards which could be utilized in providing needed additional service to the port.

Rail service at other ports.—Applicants, especially those engaged in trunkline service, have had considerable experi-

ence in handling foreign commerce to, from, and through various ports within the United States. Practically every port along the east and west coasts, and the Gulf of Mexico, enjoys multiple railroad service either through extensive lighterage or other shipping arrangements for the direct handling of export and import freight to and from shipside, or by means of a terminal railroad, usually an independent belt line. Some industries at Great Lakes ports, including the port of Chicago are served by only one railroad, but in every instance where that is the case the industry so served is located on privately owned property, as distinguished from public property, or on land owned and developed at the expense of the railroad providing the exclusive service. Such a situation does not exist at Lake Calumet Harbor. The facilities there are licensed and operated as public elevators and warehouses, each competing with each other. The record is replete with the testimony of shippers and transportation men comparing the ports which enjoy competitive rail service with the ports restricted to the service of one railroad. Without doubt, in connection with facilities of the magnitude here involved, multiple rail service is more desirable from the standpoint of efficient and economical service to the general public.

Production of grain in tributary territory.—The territory considered tributary to Chicago as a grain market produces 64 percent of all the wheat, 73 percent of the corn, 81 percent of the oats, 78 percent of the barley, and 80 percent of the soybeans grown in the United States. Within this area, which embraces some 14 States, are numerous interior terminals and subterminal markets that are dependent upon the primary Chicago market.

During the year 1956, the total receipts of grain at Chicago numbered 67,241 carloads, of which 84 percent

came inbound over carriers, directly or indirectly applicants, and 5 percent were handled by the Rock Island and Nickel Plate. Most of this traffic moved outbound to the east. Studies of movements of grain to Chicago elevators indicate that numerous delays have occurred, particularly in connection with the movements from the inspection tracks. Under existing law, Federal and State inspections must be made of each carload of grain shipped, and each railroad designates the track or tracks upon which such inspection takes place. This creates a problem, especially in the export trade. The experience of the grain operators is that the more a car has to be handled, the greater the time in transit. Classification, reclassification, handling, and rehandling to accomplish interchanges among railroads always take a longer time than when handled by a single carrier direct.

Crosstown switching.—Under the so-called Lowry Agreement of 1910, which was designed to bring about a unification of practices with respect to switching rates and rules to apply within the Chicago switching district, each road-haul carrier operating to and from Chicago has been afforded the opportunity of reaching industries served by another railroad by the absorption of allowances of the terminal line. Prior to the Lowry agreement, a chaotic situation prevailed because of the lack of uniformity in the measure of the terminal carrier's switching charges and in the rules of road-haul carriers as to the absorption of such changes. The measure of allowances subscribed to under the agreement and absorbed by the road-haul carriers is applicable regardless of the length of service performed by the terminal line. The measure of allowances falls into two levels, with those received by the Rock Island on carload traffic generally, and on grain, being at

the low level. Thus the terms under which the Rock Island must operate as a terminal line at the Lake Calumet port by reason of the Lowry agreement serve to give assurance that other rail carriers are and will be afforded an opportunity of reaching the port through switching arrangements and by reasonable switching rates.

If three railroads participate in a crosstown switching movement, the originating line gets 37½ percent, the intermediate line gets 25 percent, and the delivering line gets 37½ percent of the revenue. The originating line does the switching at the origin point and carries the car to the point of interchange with the second carrier. The second carrier carries the car to point of interchange with the third carrier. The third carrier carries the car to the destination industry and performs the switching there.

On a two-line switching movement, the originating and terminating carriers each receives 50 percent of the revenue. The originating carrier performs switching at the point of origin and carries the car to the point of interchange. The second carrier receives 50 percent of the revenue and carries the car from point of interchange to the destination industry, and there switches the car.

In the one-line switching movement, the carrier performs the switching at the point of origin, carries the car to the destination, and performs the switching at the destination industry, retaining the entire revenue from the movement.

At the present time, and for the foreseeable future, many important crosstown movements of grain are and will be made in the Chicago switching district, and such movements involve an important part of the grain business at Chicago. The record shows that the loaded crosstown movements from January 1 to August 31, 1957, amounted

to 1,242 cars out of a total of 8,365 carloads to and from the port. Rates and charges covering shipments moving entirely within the Chicago switching district are based on a minimum of 60,000 pounds per car. At the present time, rates for service in the Chicago switching district are as follows: For a one-line haul, 8½ cents per hundredweight, minimum per car $51; for a two-line haul 9½ cents per hundredweight, minimum per car $57; and for a three-line haul or more 10½ cents per hundredweight, minimum per car $63. There are a few exceptions to the rates so prescribed. On the basis of an average carload of wheat containing 1,813 bushels, charges on a crosstown switch of $92.43 for a single-line movement, $103.34 for a two-line movement, and $114.22 for a three-line movement would result. The Rock Island is willing to enter into arrangements with other railroads to bring about a single level of rates for all intraswitching district traffic regardless of the number of railroads involved in the service.

Within the Chicago switching district there are 4,405 industries served exclusively by 1 railroad, of which 202 are served by the Rock Island and 34 by the Nickel Plate. The Chicago Belt serves 377 industries exclusively for its own account, and the proprietors of the Chicago Belt, including the Illinois Central and the Pennsylvania, serve 1,489. The New York Central and its subsidiaries serve 656 industries exclusively. The Indiana Harbor Belt serves 365 industries exclusively for its own account, and the Milwaukee and the North Western, 2 of the owners of the Indiana Harbor Belt, serve 1,288. If the applications herein are approved, an additional 1,917 industries in the Chicago switching district would receive direct single-line service to the port, and service to the remainder of the industries therein would require at most a two-line movement. The fact that the applicants will be pro-

viding line-haul services directly into the port will necessarily result in the elimination of the delays connected with the interchange of the cars between the line-haul carrier and the delivering carrier. It will also result in substantial savings by the applicants of switching charges presently absorbed on Rock Island deliveries. A witness for one of the industries now located at the port, testifying on behalf of the applicants, stated that the difference between single-line and multiple-line switching rates at Chicago could be sufficient to divert to the railroads some of the traffic now handled by trucks within the switching area. Furthermore, with additional railroads participating in providing direct service at the port, there would be a greater interest and incentive to make available to midwestern shippers and receivers of freight more favorable import and export rates.

Diversion of traffic and loss of revenues.—Service to the port by the applicants would result in a diversion of traffic and consequent loss of revenues to the Rock Island. The extent of the loss would depend upon the volume of port traffic handled from year to year, and, as the volume increases, the amount susceptible to loss would be correspondingly greater. Based on the traffic handled in 1955, the Rock Island claims that the minimum annual loss of revenue to it upon approval of the applications would be $345,964. This estimate contemplates that the Rock Island would lose all the traffic it now handles exclusively within the port area. It is unlikely that such a situation would develop in view of the Rock Island's service record made since the inception of operations at the harbor and which has been maintained to the present time. It appears that the benefits to the shippers and receivers of freight to be served directly by the applicants

outweigh any injury which might result to the Rock Island. The record herein demonstrates that the ability of the Rock Island to serve Lake Calumet Harbor and the public generally will not be impaired substantially by the construction proposed by the applicants.

Prior litigation.—The Pullman Railroad and the Rock Island were the pioneers in the Lake Calumet Harbor area, the former having been there since about 1880. In Finance Docket No. 16252, Pullman R. Co. Control, 275 I.C.C. 803 (not printed in full), decided November 17, 1949, hereinafter called the *Pullman* case, the Commission, division 4, among other things, authorized the Rock Island to acquire control of Pullman Railroad through purchase of all its issued and outstanding capital stock, and to lease the railroad properties of Pullman for an initial period of 5 years, subject to the usual conditions pertaining to the neutrality of service and the maintenance of operating practices then in existence between Pullman and its railroad connections. There is no evidence in this record indicating that the prescribed conditions ever have been violated. By supplemental report and order of January 20, 1955, 290 I.C.C. 802 (not printed in full), the term of the lease was extended for an additional period of 10 years to January 1, 1965. Although they did not seek to be included in the stock control of Pullman, the Belt Railway's request for the sole stock ownership and the Illinois Central's request for partition and purchase of that portion of the Pullman's properties south of 124th Street were denied.

In Chicago R. I. & P. R. Co. v. Illinois Commerce Commission, 414 Ill. 134, 111 N.E. (2d) 136, hereinafter called the *State* case, the Supreme Court of Illinois affirmed denial of a joint application filed March 20, 1947, by the Illinois Central and its wholly owned subsidiary, Kens-

ington & Eastern, with the Illinois Commerce Commission, seeking authority to construct a track from a point in the vicinity of 127th Street, across the tracks of Pullman and across Doty Avenue to Lake Calumet Harbor. The *Pullman* case and the *State* case contain statements of fact concerning the historical background of railroad service to and from the port area which need not be restated herein. The cited cases form the sole bases for the Rock Island's present exclusive service at the port, and are relied upon heavily as ground for denial of the instant applications.

Additional authority required.—Interveners in opposition contend that the applicants, in addition to the authority requested in the pending applications, must obtain authority from us under section 1(18) of the act to operate over the tracks of the Port District within the port area. At present, the Rock Island operates over those tracks pursuant to the provisions of a contract executed with the Port District. The contract does not confer exclusive rights in the Rock Island to serve the port, but reserves to the Port District the right to permit entrance on behalf of other railroads. Under the proposals herein, the applicants desire that they be accorded the same right from the Port District to operate on Port District property as is now enjoyed by the Rock Island.

During the course of the hearing the Port District, on October 8, 1957, requested the Nickel Plate to construct a track from its Calumet yard down the east side of Lake Calumet to the site of a proposed tank farm to be located just north of the confluence of Calumet River and the lake. The Nickel Plate emphasizes the fact that it has no intention of filing a section 1(18) application to serve the tank farm, because the construction involved would

be purely an industrial spur and of such character as would not require approval by the Commission.

If the instant applications are approved, the situation prevailing on the property of the Port District would be the same as that which exists at Houston, Tex., in connection with the relationship between the Port Terminal Railroad Association and the Harris County Houston Ship Channel Navigation District, as described in Operation over Tracks of Port Term. R. Assn., 150 I.C.C. 402, Texas & N. O. R. Co. Operation, 175 I.C.C. 417, Harris County Houston Ship Channel Nav. Dist. Operation, 290 I.C.C. 83, and Finance Docket No. 19852, Harris County Houston Ship Channel Nav. Dist. Acqusition, 295 I.C.C. 830 (not printed in full), decided November 15, 1957. We are of the opinion that operation by the applicants into the Port District, as proposed, constitutes an extension of a line of railroad requiring our prior approval, and is not merely an industrial spur contemplated by the exemption contained in section 1(22) of the act.

Service to Calumet Harbor Terminals, Inc.—Early in 1957, the Pennsylvania purchased the properties of the Calumet Harbor Terminals, Inc., located at the junction of the Calumet River and Lake Calumet. The properties contained two separate parcels. One parcel consists of 32 acres east of Stony Island Avenue, bounded on the north by Lake Calumet, on the east by the Calumet River, and on the south by 130th Street. On the west it is bounded by Stony Island Avenue and the property of the Port District. The second parcel consists of 6 acres located west of Stony Island Avenue. This whole property is now served exclusively by the Rock Island, and is the only property bordering on Lake Calumet which, under its ultimate plan for development, would not be owned by the Port District.

The entire track purchased by the Pennsylvania is now leased back to the Calumet Harbor Terminals, Inc., part on a long-term lease and part on a short-term lease. The long-term lease covers the north part of the larger parcel and the short-term lease the south part of the larger parcel and the 6-acre parcel. The short-term lease may be terminated on 90 days' notice.

The track which the Pennsylvania proposes to construct into the port cuts almost through the middle of the larger parcel of the Calumet Harbor Terminals' property. The Rock Island track enters the southwest corner of the tract and would be severed by the construction proposed by the Pennsylvania.

At the hearing, the Pennsylvania stated that it expected to serve the Calumet Harbor Terminals, Inc., operations on the land owned by the Pennsylvania, but had not decided at that time whether it would permit the other applicants to serve this location. It has definitely determined, however, that Rock Island service to the facilities of Calumet Harbor Terminals, Inc., located on Pennsylvania-owned property, no longer would be permitted because, as was stated, the track providing such service would be useless as, if, and when the Pennsylvania is authorized to build into the port.

The position assumed by the Pennsylvania in this regard cannot be countenanced. The record shows that the Rock Island was instrumental in locating Calumet Harbor Terminals, Inc., at Lake Calumet Harbor, and has cooperated extensively in developing its properties as a rail-water terminal. Rock Island service was a controlling factor which influenced the management of Calumet Harbor Terminals, Inc., to locate at its present site, and such location was an important consideration in Rock Island's determination to acquire stock control of the

Pullman Railroad. No distinction should be drawn herein between the industries located on Port District property and those located on property owned by the Pennsylvania. Together, they constitute the initial phase of the planned growth and development of a large area to which additional rail service by the applicants, including the Pennsylvania, is sought. Our certificate and order herein will include an appropriate condition to assure that each and every industry now or hereafter located on Lake Calumet Harbor, whether they be situated on property owned by the Port District or on the property owned by the Pennsylvania shall have available direct rail service not only by all applicants but also by the Rock Island and the Nickel Plate as well.

Findings and conclusions.—Consideration of the entire record herein warrants the conclusion that the applications should be approved. Such approval would result in greater rail competition, better service, greater car supply, and lower rates for the industries on Port District property at Lake Calumet Harbor. Direct service to the port by the applicants would place then on a par with the Rock Island insofar as solicitation of originated grain traffic for export is concerned, and the applicants would retain control of their freight equipment made empty at the port, so that such equipment could be returned in fast shuttle service to country elevators without loss of time required by interchange.

The time has come when additional rail service at the port is required for the future development of the industries now or hereafter to be located there. Better service to shippers and receivers of freight through the elimination of delays, by providing single-line hauls, or more direct hauls, is clearly in the public interest. It would be a detriment and hindrance to the full and com-

plete development of Lake Calumet Harbor if it were limited to the service of a single trunkline railroad when so many adjacent railroads are available and anxious to serve the port. Although the port is now served by approximately 100 common-carrier trucklines, and there is no restriction on the number of barges and ships permitted to serve the port, the Rock Island is the only railroad presently serving the port.

Congress, the courts, and this Commission have placed a higher value on future convenience and necessity than on the convenience and necessity that presently might exist in section 1(18) construction proceedings. If the applicants can prove, as they have herein, that the proposed construction either presently or in the reasonably near future is necessary to meet a public need, and will be reasonably profitable, we may issue a certificate authorizing the proposed construction. Transportation service which aids in the future development of a territory is in the public interest. Interstate Commerce Commission v. Oregon-W. R. & Nav. Co., 288 U.S. 14. Considering all the circumstances in these proceedings, particularly the expansion program now in progress at the port, and the increased amount of rail traffic to be made available at the port, we are of the opinion that the additional service of the applicants is warranted. Gulf, M. & O. R. Co. Construction, 271 I.C.C. 541.

The Rock Island places too much emphasis on the effect of our decision in the *Pullman* case, and the court's opinion in the *State* case. The issues in those proceedings were entirely different from the determinations which must be made on the instant applications. Changed conditions require that the situation with respect to railroad service at Lake Calumet Harbor be reappraised in

the light of the evidence bearing upon the present and particularly the future public convenience and necessity.

Carriers have no legal right to exclusive occupancy of a territory. Indian Valley R. v. United States, 52 Fed. (2d) 485, and Pennsylvania R. Co. v. United States, 40 Fed. (2d) 921. The record herein is convincing that the applicants should have equal access with the Rock Island and the Nickel Plate to Lake Calumet Harbor, in the interest of public convenience and necessity. Compare Port Railroad Facilities, Corpus Christi, Tex., Operation, 154 I.C.C. 193.

Except for the Rock Island and the Nickel Plate, everyone appearing at the hearing supported the additional service at the port proposed by the applicants. Heretofore, we have held that the interests of the shipper and those of its customers represent the public interest whose specific transportation requirements are sought to be satisfied. Chesapeake & O. Ry. Co. Construction, 267 I.C.C. 665 (681). The volume of traffic moving through the Lake Calumet Harbor facilities is steadily increasing, and the operators of such facilities, as well as the Port District, anticipate the traffic volume will multiply many times within the next few years because of the strategic location of the port and the added flow of import-export traffic generated by the opening of the St. Lawrence Seaway. A vast amount of railroad-yard space will be necessary for the expedited and efficient handling of such added traffic. The applicants have yard space in proximity to the port equal to 12 times that of the Rock Island. Whether the facilities of the Port District at Lake Calumet Harbor are public or private property is immaterial and need not be decided in these proceedings. The future needs of the port make it advisable and expedient that more than one railroad be permitted to serve the port in the future.

The service proposed by the applicants in the instant proceedings is not unlike that proposed by the Santa Fe at Long Beach Harbor considered by us in Atchison, T. & S. F. Ry. Co. Construction, 261 I.C.C. 227. In that case reference was made to the decision in Consolidation of Railroads, 159 I.C.C. 522, and it was stated:

Generally speaking, the terminal railroad properties, wherever located, automatically fall into the aggregation of terminal properties of which they are a part. * * * All terminal properties should be thrown open to all users on fair and equal terms so that every industry on whatever rails shall have access to all lines radiating from that terminal, and every line carrier reaching that terminal shall similarly have access to all terminal tracks within the terminal area. * * *

The unification of terminal properties everywhere should put an end to disputes * * * to the advantage alike of all railroads and all users of railroads. In the interest of efficient and economical operation and the free movement of traffic restrictions in service and discrimination in charges which have arisen from differences in local terminal situations should cease to be a feature of railroad operation.

The same conclusions are warranted on the record in the instant proceedings. Compare City of Milwaukee v. Chicago & N. W. Ry. Co., supra, decided November 15, 1950, which is directly in point. See also Miami Municipal R. Extension, 158 I.C.C. 169. We find that the public convenience and necessity require the service of the applicants at Lake Calumet Harbor. Our certificate and order will provide that the construction herein authorized shall be commenced on or before June 30, 1960, and shall be completed on or before June 30, 1961.

Insofar as the section 5(2) applications are concerned, the proposed transactions do not contemplate a guaranty or assumption of payment of dividends or fixed charges, and there will be no increase in total fixed charges. No other railroad has sought to be included in the proposals. While there is no indication that carrier employees will be adversely affected by approval of the applications, our authorization herein will include conditions similar to those prescribed in Chicago & N. W. Ry. Co. Merger, 261 I.C.C. 672, for their protection.

We find that we have jurisdiction over the proposed construction and operation of lines of railroad located on the property of the Chicago Regional Port District, and over the proposed acquisitions of trackage rights over the lines of railroad hereinabove described.

We further find, subject to the aforementioned condition with respect to the protection of railway employees, and the further conditions (a) that the proposed agreement between the applicants and the Port District be amended to provide that the Port District may permit any other person, company, corporation, or association to construct, lease, or operate railroad facilities on its property for the purpose of serving the Lake Calumet Harbor area, if such construction, lease or operation is approved by us, and to eliminate any requirement for approval thereof by the other parties to the agreement, and (b) prior to exercise of the authority herein granted The Pennsylvania Railroad Company shall undertake and agree that, unless and until approved by this Commission, it shall not terminate or otherwise interfere with the right of the Chicago, Rock Island & Pacific Railroad Company to operate over existing tracks situated on the property owned by The Pennsylvania Railroad Company and acquired from the Calumet Harbor Terminals, Inc.

1. That the present and future public convenience and necessity require construction by the Illinois Central Railroad Company, the Kensington and Eastern Railroad Company, The Philadelphia, Baltimore and Washington Railroad Company, and The Pennsylvania Railroad Company of a line of railroad extending from a point near Doty Avenue to the Lake Calumet Harbor Port of Chicago, in Cook County, Ill., and that acquistion of trackage rights by the Illinois Central Railroad Company, The Pennsylvania Railroad Company, and The Chicago South Shore and South Bend Railroad over the line to be constructed and certain existing tracks will be consistent with the public interest, provided, however, and the authority herein is granted upon the express condition, that each and every industry now or hereafter located at Lake Calumet Harbor, whether they be situated on property owned by the Chicago Regional Port District or on the property owned by The Pennsylvania Railroad Company shall have available direct rail service not only by all applicants but also by the Chicago, Rock Island and Pacific Railroad Company and the New York, Chicago and St. Louis Railroad Company as well, if the latter carriers desire to provide service thereto.

2. That acquisition of trackage rights by The Belt Company of Chicago over lines of railroad leading to the Lake Calumet Harbor Port of Chicago, owned, operated, or to be constructed by the Illinois Central Railroad Company, the Kensington and Eastern Railroad Company, the Chicago South Shore and South Bend Railroad, and The Pennsylvania Railroad Company will be consistent with the public interest.

3. That acquisition of trackage rights by The Michigan Central Railroad Company, The New York Central Railroad Company, and the Indiana Harbor Belt Rail-

road Company over lines of railroad leading to the Lake Calumet Harbor Port of Chicago, owned or operated by the Illinois Central Railroad Company, the Kensington and Eastern Railroad Company, the Chicago South Shore and South Bend Railroad, and The Pennsylvania Railroad Company will be consistent with the public interest.

4. That the application of The Michigan Central Railroad Company, The New York Central Railroad Company, and the Indiana Harbor Belt Railroad Company for authority to construct and operate a line of railroad from 126th Street, Chicago, to the Lake Calumet Harbor Port of Chicago, in Cook County, Ill., filed in Finance Docket No. 19448, should be dismissed.

An appropriate certificate and order will be issued.

Commissioner Freas, dissenting:

It seems clear that no present need for additional service has been established here. Concededly, however, a clear showing of a need for the proposed service in the reasonably forseeable future would be adequate to support the required statutory findings. In my opinion, such a showing has not been made on this record.

Commissioners Arpaia, Walrath, and Herring did not participate.

CORRECTED CERTIFICATE AND ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 5th day of October A. D. 1959.

Finance Docket No. 19538

Illinois Central Railroad Company, Et Al—Construction And Trackage Rights—Lake Calumet Harbor, Cook County, Illinois.

Finance Docket No. 19448

Michigan Central Railroad Company, Et Al., Construction, Etc.

Finance Docket No. 19742

Belt Railway Company of Chicago Trackage Rights, Etc.

Finance Docket No. 19921

Michigan Central Railroad Company, Et Al., Trackage Rights.

Investigation of the matters and things involved in these proceedings having been made, a hearing having been held, and the Commission, on the date thereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity require construction by the Illinois Central Railroad Company, the Kensington and Eastern Railroad Company, The Philadelphia, Baltimore and Washington Railroad Company, and The Pennsylvania Railroad Company of a line of railroad extending from a point near Doty Avenue to the Lake Calumet Harbor Port of Chicago, in Cook County, Ill., described in

the report aforesaid: Provided however, that the construction herein authorized shall be commenced on or before June 30, 1960, and shall be completed on or before June 30, 1961;

It is ordered, That the Illinois Central Railroad Company and The Pennsylvania Railroad Company shall report, in writing, the commencement and completion of the construction authorized herein within 15 days after such commencement and completion, respectively;

It is further ordered, That the Illinois Central Railroad Company and The Pennsylvania Railroad Company, when filing schedules establishing rates and charges applicable over the line herein authorized to be constructed, shall in such schedules refer to this certificate and order by date and docket number;

It is further ordered, That if the authorization to construct herein granted is exercised, the Kensington and Eastern Railroad Company, the Illinois Central Railroad Company and The Pennsylvania Railroad Company shall submit two copies of the journal entries showing the construction of the line for the consideration and approval of this Commission;

It is further ordered, That, subject to the conditions for the protection of railway employees referred to in said report, acquisition by the Illinois Central Railroad Company, The Pennsylvania Railroad Company, and the Chicago, South Shore and South Bend Railroad of trackage rights over the line herein authorized to be constructed, and certain existing tracks described in the report aforesaid, upon the terms and conditions in said report found just and reasonable, be, and it is hereby, approved and authorized; provided, however, and this certificate and order is issued upon the express condi-

tions (a) that the proposed agreement between the applicants and the Chicago Regional Port District be amended to provide that the Chicago Regional Port District may permit any other person, company, corporation, or association to construct, lease, or operate railroad facilities on its property for the purpose of serving the Lake Calumet Harbor area, if such construction, lease, or operation is approved by us, and to eliminate any requirement for approval thereof by the other parties to the agreement and (b) prior to exercise of the authority herein granted The Pennsylvania Railroad Company shall undertake and agree that, unless and until approved by this Commission, it shall not terminate or otherwise interfere with the right of the Chicago, Rock Island and Pacific Railroad Company to operate over existing tracks situated on the property owned by The Pennsylvania Railroad Company and acquired from the Calumet Harbor Terminals, Inc.

It is further ordered, That, subject to the foregoing conditions, acquisition of trackage rights by The Belt Railway Company of Chicago over lines of railroad leading to the Lake Calumet Harbor Port of Chicago, owned, operated or to be constructed by the Illinois Certral Railroad Company, the Kensington and Eastern Railroad Company, the Chicago, South Shore and South Bend Railroad, and The Pennsylvania Railroad Company described in the report aforesaid, upon the terms and conditions in said report found just and reasonable, be, and it is hereby approved and authorized;

It is further ordered, That, subject to the foregoing conditions, aquisition of trackage rights by The Michigan Central Railroad Company, The New York Central Railroad Company and the Indiana Harbor Belt Railroad

Company over lines of railroad leading to the Lake Calumet Harbor Port of Chicago owned or operated by the Illinois Central Railroad Company, the Kensington and Eastern Railroad Company, the Chicago, South Shore and South Bend Railroad and The Pennsylvania Railroad Company described in the report aforesaid, upon the terms and conditions in said report found just and reasonable, be and it is hereby, approved and authorized.

And it is further ordered, That the application of The Michigan Central Railroad Company, The New York Central Railroad Company and the Indiana Harbor Railroad Company, recorded in Finance Docket No. 19448, for authority to construct and operate a line of railroad extending from 126th Street to the Lake Calumet Harbor Port of Chicago, in Cook County, Ill., be, and it is hereby, dismissed.

By the Commission.

Harold D. McCoy
Secretary

(Seal)

APPENDIX D.

APPENDIX D.

INTERSTATE COMMERCE COMMISSION.

Finance Docket No. 19538[1]

Illinois Central Railroad Company Et Al. Construction and Trackage Rights, Lake Calumet Harbor, Cook County, Ill.

Decided September 19, 1960

Supplemental certificate issued authorizing operation under lease by the Illinois Central Railroad Company, the Pennsylvania Railroad Company, the Chicago South Shore and South Bend Railroad, the Belt Railway Company of Chicago, the New York Central Railroad Company, and the Indiana Harbor Belt Railroad Company over the existing tracks of the Chicago Regional Port District at Lake Calumet in Cook County, Ill.

Additional appearances: Windsor F. Cousins and Marvin A. Jersild for applicants; and Joseph B. Fleming for railroad interveners in opposition.

Supplemental Report of The Commission.

By The Commission:

By report, corrected certificate and order, dated October 5, 1959, 307 I.C.C. 493, we authorized, among other things, (a) the construction by the Illinois Central Rail-

[1] This report also embraces Finance Docket No. 19742, Belt Railway Company of Chicago Trackage Rights, Etc.; and Finance Docket No. 19921, Michigan Central Railroad Company Et Al., Trackage Rights.

road Company,[2] The Kensington and Eastern Railroad Company, The Philadelphia, Baltimore and Washington Railroad Company and The Pennsylvania Railroad Company of a line of railroad extending from a point near Doty Avenue to the Lake Calumet Harbor Port of Chicago (harbor port) in Cook County, Ill., and (b) the acquisition of trackage by the Illinois Central, the Pennsylvania, and the Chicago South Shore and South Bend Railroad (South Shore) over the line to be constructed and certain existing tracks, Finance Docket No. 19538; (c) the acquisition of trackage rights by The Belt Railway Company of Chicago (Belt Railway) over lines of railroad leading to the harbor port, owned, operated, or to be constructed by the Illinois Central, the Kensington & Eastern, the South Shore and the Pennsylvania, Finance Docket No. 19742; and (d) the acquisition of trackage rights by The Michigan Central Railroad Company, The New York Central Railroad Company, and the Indiana Harbor Belt Railroad Company over lines of railroad leading to the harbor port, owned or operated by the Illinois Central, the Kensington & Eastern, the South Shore, and the Pennsylvania, Finance Docket No. 19921.

These proceedings involve the efforts of six operating railroads,[3] subject to the provisions of part I of the Interstate Commerce Act, to provide additional rail service to the harbor port and harbor port facilities, constructed or to be constructed, by the Chicago Regional Port Dis-

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[2] The individual railroads sometimes will be referred to by distinctive names in each corporate title, or by the designation shown in parentheses.

[3] The Kensington & Eastern and the Philadelphia, Baltimore & Washington are non-operating companies. The former is owned by the Illinois Central and the latter is leased by the Pennsylvania. The New York Central is lessee of the Michigan Central.

trict (Port District) which had been exclusively served by the Pullman Division of the Chicago, Rock Island and Pacific Railroad Company (Rock Island).

While the applicants desired and it was their intention to serve the present and future industries, elevators, warehouses, docks, and piers in the harbor area, the original appliances as filed were not sufficiently broad to permit authorization to operate over tracks owned by the Port District to serve such facilities on the Port District property.

Accordingly, in our report of October 5, 1959, supra, page 498, we sustained the contention of the New York, Chicago and St. Louis Railroad Company (Nickel Plate) that the applicants had failed to file appropriate applications for such authority. The authority, subsequently granted, was not to be construed:

as authority to the applicants to operate over the tracks owned by, and located within, the Port District.

Continuing we said, at pages 525-526:

Additional authority required.—Interveners in opposition contend that the applicants, in addition to the authority requested in the pending applications, must obtain authority from us under section 1(18) of the act to operate over the tracks of the Port District within the port area. At present, the Rock Island operates over those tracks pursuant to the provisions of a contract executed with the Port District. The contract does not confer exclusive rights in the Rock Island to serve the port, but reserves to the Port District the right to permit entrance on behalf of other railroads. Under the proposal herein, the applicants desire that they be accorded the same right

from the Port District to operate on Port District property as is now enjoyed by the Rock Island.

* * *

We are of the opinion that operation by the applicants into the Port District, as proposed, constitutes an extension of a line of railroad requiring our prior approval, and is not merely an industrial spur contemplated by the exemption contained in section 1(22) of the act.

Thereafter, on April 6 and 7, and May 18, 1960, the applicants, either jointly or severally, filed various documents as supplements to their original applications so as to request the necessary authority to operate over the existing tracks of the Port District, approximately 10.6 miles in length, to the extent necessary for the applicants to serve the industrial facilities located, or to be located, on such Port District owned property.

The Nickel Plate and the Rock Island, interveners in opposition in the original proceedings, have filed documents in answer, protest and as intervening petitions, in which they request that if the above-mentioned documents of the applicants institute new proceedings that they be permitted leave to intervene; in which they contend that regardless of the form of the applicants' latest documents we have no authority to enter any order without requiring the preliminary steps to be taken by the applicants pursuant to the rules and regulations of this Commission and without a rehearing; and in which they protest against the relief, orders, and certificates sought in the so-called supplements. A reply to the Nickel Plate and the Rock Island has been made by the applicants.

All of the applicants' documents, however entitled, are in fact, and will be construed as, supplemental applications under section 1(18) of the act for extensions of

their respective lines of railroad. Inasmuch as the applicants, in their original presentation, intended that they be accorded the same rights to operate on Port District property as are now enjoyed by the Rock Island, the supplemental applications will be considered in conjunction with the original applications, and we believe properly so. As the Rock Island and the Nickel Plate have heretofore been authorized to intervene in the original proceedings, in which the supplemental applications have been docketed, no further grant of permission to intervene is deemed necessary.

Not only have the applicants now filed proper supplemental applications for the authority sought under section 1(18), but they have either filed, or incorporated by reference, response to the so-called return to questionnaire required by our rules and regulations. They have further complied with the rules and regulations governing such applications in regard to service and the publishing of proper public notice. Such procedural steps, although subsequent to the interveners' protest, were made properly within the time prescribed.

The Nickel Plate and Rock Island further contend that the authority sought in either the original applications or the supplements may not properly be granted without full prior compliance with all requirements of procedure and law which, among other requirements, would include simultaneous hearings on any and all aspects of the plan to reach and serve Lake Calumet, and that they will be prejudiced unless hearing is held.

In Woodruff v. United States, 40 F.Supp. 949, the District Court in reviewing an appeal from a section 1(18) proceeding, considered the entitlement of a party to a

formal hearing on a proposed abandonment as a matter of right, and stated:

The shortest answer to this contention lies in the simple observation that the plaintiff had no right to a formal hearing in the premises. For Par. 19 of Sec. 1 of the Interstate Commerce Act, as amended, 49 U.S.C.A. sec. 1(19), as also 49 U.S.C.A. 20a(6) to which it contains a reference, make it plain that on a proposed abandonment of a railroad line in addition to the railroad involved only the Governor of a State or other appropriate State authority is entitled to be heard as of right. Section 1, Par. 19, expressly confers on the I.C.C. power to prescribe "rules and regulations as to hearings". And section 20a(6) provides that the Commission "may hold hearings, if it sees fit, to enable it to determine its decision." The language quite clearly contemplates that the State authorities shall be consulted, but that hearings shall be had only if the Commission see fit. • • •

While the *Woodruff* case involved an abandonment proceeding, section 1(18) to which the ruling was directed concerns itself with the application for and issuance of any certificate of public convenience and necessity. The statute does not go to the length of entitling the protesting Rock Island and Nickel Plate to a hearing as a matter of right, and it is our opinion that a hearing is not necessary to enable us to make determinations herein.

Further opposition to the granting of the authority sought is presented by the Rock Island on the grounds that they are adequately serving the Port District; that they have expended large sums of money in the construction of facilities to serve it; that they propose to and are prepared to expend further sums of money to keep themselves in a position to serve such Port District ade-

quately; that they are entitled to retain the traffic of the Port District; that there is no reason adequate in law for the extension of the line of railroad of the applicants into territory heretofore exclusively served by protestants; that the expenditures of sums of money required to be spent by applicants for the construction of the proposed extension cannot be justified either in fact or in law; and that the extension of the line of railroad of applicants is not supported by public convenience and necessity.

The Nickel Plate's position is that it is well able along with the Rock Island to furnish any and all railroad service required at Lake Calumet.

Examination of the record discloses that these are the same arguments and contentions that were set forth in protestants' original briefs, exceptions to the examiner's proposed report, in their petitions for reconsideration, and in their oral arguments. We fully discussed and considered these contentions in our report of October 5, 1959, and again considered them in disposing of the protestants' petitions for reconsideration and reargument.

Although we found the original applications to be so limited that the authority required to perfect the single plan, i.e., whereby each of the applicants would be providing line-haul service directly into the port and additional service to the facilities now located or hereafter to be located at the harbor port, could not thereunder be authorized, orderly procedure dictated that evidence as to the entire plan be presented. To that end, hearing was held to develop all the facts pertaining to the public need for additional rail service to and from the port.

The hearing, which consumed 2 weeks, saw the presentation of testimony and exhibits having as their purpose

proof that the present and future public convenience and necessity required the extension of the applicants' lines of railroad and operation into the harbor port area over the tracks of the Port District to serve the facilities located or to be located thereon. Applicants, through witnesses as well as through counsel, made clear that the only real purpose of the applications was to serve the industries, elevators, docks, piers, and other facilities at the harbor port by means of the tracks of the Port District. The witnesses for the Port District and tenants at the port, interveners, left no doubt but that they expected and desired applicants to use such tracks. In addition, a proposed lease agreement between the Port District and the applicants, a joint facility agreement, and trackage rights agreement, all contemplating a coordinated and practical operation for the applicants into the port, contrary to protestants' contention of being inadmissible, were received in evidence and considered by us in our original determination to accord the applicants the same right from the Port District to operate on Port District property as is now enjoyed by the Rock Island. That such complete authority could not immediately be granted under the applications as then filed did not, in our opinion, restrict receipt of such evidentiary material as proof of "the many advantages and benefits of applicants' service for fruition of the plans envisioned and in the process of being executed, on schedule, by the Port District," and the impelling need for additional rail service at the port.

Such authority as has heretofore been granted, we consider as the first step in the overall plan to provide adequate rail service to the Lake Calumet Harbor area. That it was limited was due to technical deficiency which by proper application has now been cured. We see no

need for further hearing or to require the reintroduction into evidence of the same basic testimony and exhibits which were introduced at the original hearing. Nor do we deem it proper to revisit upon the applicants and intervening parties the additional time and expense incident to a long and repetitious hearing.

The form of lease under which the applicants would use the tracks owned by the Port District was introduced as an exhibit at the hearing. In addition, since the Port District tracks were to be used by several railroads, as well as by the Rock Island, a memorandum of understanding was made as to the method to be followed in achieving efficient switching within the port area. We fully discussed and considered such agreements in our report of October 5, 1959, and for that reason they will not be detailed herein.

We found objection to only one provision, that in the proposed lease, wherein the Port District would agree not to permit any other person, company, corporation, or association to construct, lease, or operate railroad facilities on its property for the purpose of serving the harbor port area, other than as presently covered by leases or contracts with the Rock Island and the Philadelphia, Baltimore & Washington, except upon written approval from the applicants as lessees. We were of the opinion that this provision between the Port District and the applicants was objectionable because it would tend to unduly restrain competition and for that reason issued our certificate and order of October 5, 1959, under the express condition that the proposed lease agreement be amended to provide that the Port District may permit any other person, company, corporation, or association to construct, lease, or operate railroad facilities on its property for the purpose of serving the Lake Calumet

Harbor area, if such construction, lease, or operation is approved by us, and to eliminate any requirement for approval thereof by the other parties to the agreement.

The applicants have now submitted a revised lease agreement, modified as required by our order of October 5, 1959, to the receipt of which the protestants object on the grounds that the original joint operating agreement and lease (a) cannot now be cured retroactively after 2½ years; (b) is incomplete on its face both as to the property covered thereby and the consideration to be paid by lessees; (c) that there is no evidence that the revised lease is acceptable to the lessor or will ever be executed or will constitute a vaild and binding lease if executed as presented; (d) that the approval sought is for the advance right and power to agree with the Port District on such variations of the provisions of the revised lease as is mutually agreeable to them; and (e) they should have full opportunity and right of cross-examination.

With the exception of the revision ordered, the principal provisions of the lease are identical to the agreement originally considered by us. The condition imposed in our order was an express mandate to the parties to perfect the lease, which has been done and now resubmitted to us according to that mandate. The description of the property covered is identical to the description in the original document and is fully supported by accompanying exhibits. The consideration to be paid is as previously set forth, i.e., the property would be leased to the applicants for an annual rental based on 5 percent of an agreed valuation, provided that the total rental, payable in any calendar year, should not exceed an amount equivalent to $2 per car, loaded or empty, or locomotive handled to or from the property during such

calendar year. The contract of lease would run for 20 years, with the option in the applicants for a renewal for four additional terms of 20 years each, on the same terms and conditions.

We find that the lease agreement, as amended, is reasonable and adequate to accomplish the purpose for which it is intended. Whether the lease will be finally executed by the parties is for their determination, and there is no indication by the parties that such lease would not be executed. Any change in the terms or provisions of the lease subsequently made by the parties, or further modification, contrary to the contentions of the protestants, would require our prior approval and authorization.

The protestants contention that they should have full opportunity and right of cross-examination with respect to the revised lease is without substance. The record shows they have unlimited opportunity to cross-examine with reference to the provisions of the lease and availed themselves of petition for reconsideration of our order of October 5, 1959, which directed the modification of the presented lease.

The industries and tracks in the Port District are the only facilities of any significance that can be served by the applicants herein when using the trackage rights or utilizing the tracks constructed pursuant to our prior authorization and approval. The needs of the shippers to and from the Port District, and of the shippers located in the harbor port area, requiring additional rail service from the applicants in order to realize the developments of the potentials of the port area have been demonstrated. The reason upon which we base the present and future public convenience and necessity have been enumerated

and detailed by the applicants, substantiated by testimony during the hearings in these proceedings, and all showing the requirements and necessity of the proposed operation culminated in the findings in our prior report. Those findings are adopted and affirmed herein.

Contentions of the parties as to either law or fact not specifically discussed herein have been given consideration and found without material significance or not justified.

In view of the foregoing, we find that the present and future public convenience and necessity require operation under lease by the Illinois Central Railroad Company, The Pennsylvania Railroad Company, the Chicago South Shore and South Bend Railroad, The Belt Railway Company of Chicago, The New York Central Railroad Company, and the Indiana Harbor Belt Railroad Company over the existing tracks of the Chicago Regional Port District at Lake Calumet Harbor in Cook County, Ill., described herein.

An appropriate supplemental certificate will be issued.

Commissioner Freas, dissenting:

Consistent with my separate expression in the prior report in these proceedings, 307 I.C.C. 493, 531, I would deny the supplemental applications involved herein.

Commissioners Walrath and Herring did not participate.

SUPPLEMENTAL CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 19th day of September, A. D. 1960.

Finance Docket No. 19538

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL. CONSTRUCTION AND TRACKAGE RIGHTS, LAKE CALUMET HARBOR, COOK COUNTY, ILLINOIS

Finance Docket No. 19742

BELT RAILWAY COMPANY OF CHICAGO TRACKAGE RIGHTS, ETC.

Finance Docket No. 19921

MICHIGAN CENTRAL RAILROAD COMPANY, ET AL., TRACKAGE RIGHTS

Investigation of the matters and things involved in these proceedings having been made, and the Commission, on the date hereof, having made and filed a supplemental report containing its findings of fact and conclusions thereon, which supplemental report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity require operation under lease by the Illinois Central Railroad Company, The Pennsylvania Railroad Company, the Chicago, South Shore and South Bend Railroad Company, The Belt Railway Company of Chicago, The New York Central

Railroad Company, and the Indiana Harbor Belt Railroad Company over the existing tracks of the Chicago Regional Port District at Lake Calumet Harbor in Cook County, Ill., described in the supplemental report aforesaid;

It is ordered, That the aforesaid common carriers by railroad, when filing schedules establishing rates and charges applicable to said lines of railroad, shall in such schedules refer to this certificate by date and docket numbers;

It is further ordered, That, if the authority granted in this certificate is not exercised within one year from its date, it shall be of no further force or effect.

By the Commission.

Harold D. McCoy,
Secretary.

(Seal)

APPENDIX E.

APPENDIX E

Finance Docket No. 19538[1]

ILLINOIS CENTRAL RAILROAD COMPANY ET AL. CONSTRUCTION AND TRACKAGE RIGHTS, LAKE CALUMET HARBOR, COOK COUNTY, ILL.

Decided November 26, 1962

Second supplemental certificate and order issued authorizing operation, under nonexclusive use agreement, by the Illinois Central Railroad Company. The Pennsylvania Railroad Company, the Chicago, South Shore and South Bend Railroad Company, The Belt Railway Company of Chicago, The New York Central Railroad Company, and the Indiana Harbor Belt Railroad Company over the existing tracks of the Chicago Regional Port District at Lake Calumet Harbor in Cook County, Ill. Previous reports 307 I.C.C. 493 and 312 I.C.C. 277.

Appearances as in previous reports.

Second Supplemental Report of the Commission

By the Commission:

By report, certificate, and order, dated October 5, 1959, 307 I.C.C. 493, we authorized, among other things, the

[1] This report also embraces Finance Docket No. 19742, Belt Railway Company of Chicago Trackage Rights, Etc., and Finance Docket No. 19921, Michigan Central Railroad Company et al. Trackage Rights.

Illinois Central Railroad Company, The Pennsylvania Railroad Company, the Chicago, South Shore and South Bend Railroad Company, The Belt Railway Company of Chicago, The New York Central Railroad Company, and the Indiana Harbor Belt Railroad Company, referred to collectively herein as the applicants, all common carriers by railroad subject to the provisions of part I of the Interstate Commerce Act, to construct or operate lines of railroad leading to the Lake Calumet Harbor Por of Chicago in Cook County, Ill. However, we found that although it was the applicant's intention to serve the present and future industries, elevators, warehouses, docks, and piers appurtenant to the harbor, their original applications were not broad enough to permit the authority which they requested to operate over the tracks of the Chicago Regional Port District (Port District) to serve the facilities located on the Port District's property in the harbor area.

The applicants filed various supplemental applications to correct the deficiencies in their original applications, and by report and certificate dated September 19, 1960, 312 I.C.C. 277, we found that the public convenience and necessity required the nonexclusive operation under lease by the applicants over the approximately 10.6 miles of existing tracks of the Port District. We held that a proposed agreement (lease agreement) submitted with the supplemental applications was reasonable and adequate to accomplish the purpose for which it was intended and that any change in the terms or provisions of the lease subsequently made would require our prior approval and authorization.

Pursuant to the aforesaid authorization, the applicants on June 12, 1961, entered into an agreement with the Port District (modified agreement) which, upon perusal

by us, was found to differ to some extent from the terms of the aforesaid approved lease agreement. Upon being informed of this fact, the applicants, by petition filed December 1, 1961, requested approval of the modified agreement for the non-exclusive use of the tracks and facilities of the Port District. The New York, Chicago and St. Louis Railroad Company (Nickel Plate) and the Chicago, Rock Island and Pacific Railroad Company together with its subsidiary, The Pullman Railroad Company (the two last-named carriers will be referred to collectively herein as the Rock Island), interveners in opposition in both prior reports, replied to the applicants' petition.

The harbor and its surrounding area, the tracks and facilities of the Port District there located, the corporate nature and functions of the Port District, the operations proposed by the applicants, and the opposition of the interveners with respect thereto are discussed in our previous reports in these proceedings. These matters will be further discussed herein only to the extent necessary for clarity.

In our report of September 19, 1960, we held that a hearing was not necessary for a determination of the questions at issue. We also denied a request of the Rock Island for further hearing by our order of August 23, 1962. Since the general public convenience and necessity for the applicants' operations over the Port District's tracks has been determined with only the specific terms and conditions of such operations remaining for approval, and since most of the interveners' objections to the modified agreement are actually only reiterations of their objections to the overall proposals of the applicants to serve the harbor area which have been previously

discussed and disposed of in our prior reports and orders herein, we do not deem it proper to revisit upon the applicants and other parties to the proceeding the additional time and expense of a hearing upon the modified agreement.

The first modification proposed by the applicants is the deletion from the lease agreement of the terms "lease" and "lessee." The modified agreement refers to the "use" instead of the "lease" of the Port District's tracks and facilities. This change in language is made to conform to Illinois property law in order to eliminate any reference to the lease of land.

Other proposed changes include a provision that the modified agreement does not apply to industry-owned tracks on the Port District's property and is made subject to the Rock Island's rights to the Port District's tracks and facilities. The lease agreement applies to those tracks and facilities which the Port District might acquire. The modified agreement is applicable only to the Port District's existing tracks and facilities, except that upon application by a majority of the applicants, the Port District may construct additional tracks and facilities which will then be included in the agreement. The provision of the lease agreement for a reduction in rental payments upon an additional carrier or carriers being admitted to the use of the Port District's tracks has been eliminated in the modified agreement, as has the requirement that any such additional carrier be physically connected to the Port District's property to become a party to the agreement.

The modified agreement is more detailed than the lease agreement in its recitation of the duties of the applicants in maintaining and renewing in proper op-

erating condition, at their sole cost and expense, the tracks and facilities involved and in providing service to the Port District's tenants at lawfully established tariff rates.

The modified agreement also provides that should any one or more of the applicants fail to meet its or their obligation thereunder, the defaulting party or parties will forfeit all rights under the agreement and will also forfeit any right to future participation in the use of the tracks and facilities and may be readmitted only by obtaining our approval and the approval of the Port District and the other applicants. This provision of the modified agreement notwithstanding, no operation authorized herein is to be abandoned by any applicant without our prior approval under section 1(18) of the act.

The lease agreement provides for an annual rental based on 5 percent of an agreed valuation of the properties involved with the maximum payable in any calendar year not to exceed an amount equivalent to $2 per car, loaded or empty, or locomotive handled to or from the Port District's property during such calendar years. The modified agreement removes the valuation basis for rental payments and substitutes therefor a flat, user-basis charge of $2 per revenue car only.

According to the interveners this user-based rate was arrived at by the parties as a compromise; the applicants desiring maximum payments under the modified agreement to be set at an amount equal to interest at 5 percent on the value of the tracks to be used (shown on the record to be $747,184.04 representing the cost of the trackage involved, excluding land, for the past 5 years) and the Port District requesting guaranteed minimum payments in the same amount. The interveners argue that

if the volume of traffic predicted at the hearings in 1957 materializes (76,500 to 77,500 cars by the end of 1962), the rentals agreed upon, when added to maintenance and operating expenses, would be unreasonable. On the other hand, they argue, if the estimates have not been fulfilled there is clearly no need for the applicants' service. They contend that the record is deficient in evidence pertaining to the future value of the trackage and traffic volume from which we can determine the reasonableness of the consideration to be paid.

We do not agree with the interveners that lack of information concerning the future value of the tracks or the volume of traffic anticipated thereover bars approval of the modified agreement. We have never adopted any exclusive formula for determining the reasonableness of proposed rentals for railroad trackage. We believe that rentals generally may be considered reasonable where, as here, the facts of record disclose that non-affiliated parties, after bargaining at arm's length, have entered into an agreement under which increased service will be offered to the public, all parties to the agreement will benefit financially, and the interveners' ability to continue to serve the public will not be impaired.

The elimination in the modified agreement of the rental based on the valuation of the trackage provided for in the lease agreement and the charges for locomotives and empty cars using the tracks, referred to in our report of September 19, 1960, will obviously redound to the benefit of the applicants.

The modified agreement requires that, before it becomes effective, the applicants submit to the Port District, in form and substance satisfactory to the Port District, an agreement between the applicants for the centralized

supervision of the operation, maintenance, and repair of the tracks and facilities involved. The Port District will retain the right to require from time to time, changes and modifications in such agreement when in its opinion such changes or modifications are necessary.

Although the lease agreement did not, by its terms, specifically provide for the execution of such an agreement, the applicants have from the inception of this proceeding been joined in an unsigned memorandum of understanding as to the method to be followed in exercising the rights to be acquired in the harbor area. The pertinent provisions of this memorandum of understanding were discussed in our prior reports. They need not be further discussed herein. The memorandum of understanding has now been adopted by the individual applicants over the signatures of appropriate officers as the centralized supervision agreement required by the modified agreement and accepted as such by the Port District.

The interveners contend that the provisions of the centralized supervision agreement require our approval and that the applicants have not submitted evidence of authority from their boards of directors to execute such an agreement or to submit the same for our approval. They also contend that if so approved the agreement would be a far-reaching delegation of our authority to the Port District since that party could require a change in the method of service that would result in a major modification of the applicants' rights in the harbor area.

We must necessarily consider the provisions of the centralized supervision agreement as part of the terms and conditions of the modified agreement. However, inasmuch as the sole purpose of the centralized supervision

agreement is the coordination of the separate services of the applicants to achieve efficiency in the switching within the harbor area which we have already determined to be required by the public convenience and necessity, and the effectuation of control of two or more carriers in a common interest within the meaning of section 5(2) of the act is not contemplated, the agreement does not in itself require our approval and authorization. See Railway Labor Executives' Assn. v. United States, 151 F. Supp. 108. However, no change in the terms of the modified agreement resulting from a revision of the centralized supervision agreement is to be effected without our prior approval.

The provisions in the lease agreement with respect to the payment of taxes and the construction and maintenance of grade crossings are changed in the modified agreement only to the extent of establishing the liability of the applicants for taxes on their own property and the sole discretion of the Port District in locating grade crossings. The provisions in regard to liability for injury or death to persons and loss or damage to property remain essentially unchanged in the modified agreement.

The modified agreement will permit the Port District to make separate and distinct agreements with other railroads for the use of the tracks and facilities which it owns. However, such subsequent agreements are to be reasonably comparable to the modified agreement. It also prohibits the assignment of the agreement by the applicants without the prior written consent of the Port District.

The modified agreement will change the duration of the agreement from the 20-year term, with the option in the applicants for its renewal for four additional terms of 20 years, provided for in the lease agreement, to an

effective term of 35 years from the date operations are commenced, or to July 1, 1995, whichever date occurs first.

As indicated, the method of determining rentals provided for in the modified agreement should be more favorable to the applicants than the method set out in the lease agreement which we have previously approved. The other changes in the arrangements between the applicants and the Port District effected by the modified agreement are, for the most part, desirable in that they reword and rearrange the lease agreement to comply with State property laws; show that the agreement is not intended to apply to industry-owned tracks, affect the rights heretofore held by Rock Island, or grant the applicants any exclusive privileges in the Port District's property; and otherwise define more clearly the rights and responsibilities of the parties. Accordingly, we fined that the modified agreement for the nonexclusive use of the Port District's trackage and facilities is reasonable and adequate to accomplish the purpose for which it is intended.

Our authorization herein is granted upon the understanding that no additional carrier is to be admitted to the operation of the Port District's tracks and facilities, no further extensions of the applicants' lines of railroad on the Port District's property herein involved will be constructed or acquired, no change or modification, in addition to those previously referred to, in the terms of the modified agreement will be accomplished without our prior approval.

We find that the present and future public convenience and necessity require operation under a modified nonexclusive use agreement by the Illinois Central Railroad

Company, The Pennsylvania Railroad Company, the Chicago, South Shore and South Bend Railroad Company, The Belt Railway Company of Chicago, The New York Central Railroad Company, and the Indiana Harbor Belt Railroad Company over existing tracks of the Chicago Regional Port District at Lake Calumet in Cook County, Ill., described herein.

An appropriate supplemental certificate and order will be issued.

Commissioner Bush, dissenting:

In my opinion, the provisions of the act do not require our approval of the certified supervision agreement nor the agreement for the non-exclusive use of tracks and facilities at the Lake Calumet Port within the Chicago switching district. The amended proposal does not constitute the extension of a line of railroad. It is a contractual arrangement for the joint use of switching tracks within the port facility, expressly excluded from sections 1(18) and 5, and the mandatory provisions of section 1(22). The power to order or authorize the establishment, abandonment, or joint use of such tracks, although employed largely for interstate commerce, lies not with us but the States. I would, therefore, discontinue this present proceeding for want of jurisdiction.

Commissioner Freas dissents.

Vice Chairman Walrath did not participate.

SECOND SUPPLEMENTAL CERTIFICATE AND ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 26th day of November A. D. 1962.

Finance Docket No. 19538

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL., CONSTRUCTION AND TRACKAGE RIGHTS, LAKE CALUMET HARBOR, COOK COUNTY, ILLINOIS

Finance Docket No. 19742

BELT RAILWAY COMPANY OF CHICAGO TRACKAGE RIGHTS, ETC.

Finance Docket No. 19921

MICHIGAN CENTRAL RAILROAD COMPANY, ET AL., TRACKAGE RIGHTS

Investigation of the matters and things involved in these proceedings having been made, and the Commission, on the date hereof, having made and filed a second supplemental report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity require operation under a non-exclusive use agreement by the Illinois Central Railroad Company, The Pennsylvania Railroad Company, the Chicago, South Shore and South Bend Railroad Company, The Belt Railway Company of Chicago, The New

York Central Railroad Company, and the Indiana Harbor Belt Railroad Company over the existing tracks of the Chicago Regional Port District at Lake Calumet Harbor in Cook County, Ill., described in the second supplemental report aforesaid;

It is ordered, That the applicants when filing schedules establishing rates and charges applicable to said tracks, shall in such schedules refer to this certificate by date and docket number; and

It is further ordered, That if the authority granted herein is not exercised within one year from the effective *date of this certificate and order,* it shall be of no further force or effect.

By the Commission.

Harold D. McCoy
Secretary.

(Seal)

APPENDIX F.

APPENDIX F.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 23rd day of August, A. D. 1962.

Finance Docket No. 19538

ILLINOIS CENTRAL RAILROAD COMPANY ET AL. CONSTRUCTION AND TRACKAGE RIGHTS, LAKE CALUMET HARBOR, COOK COUNTY, ILLINOIS

Finance Docket No. 19742

BELT RAILWAY COMPANY OF CHICAGO TRACKAGE RIGHTS, ETC.

Finance Docket No. 19921

MICHIGAN CENTRAL RAILROAD COMPANY ET AL. TRACKAGE RIGHTS

Upon consideration of the record in the above-entitled proceedings including the document entitled "Applicants' Submission In Compliance With The Commission's Order dated May 15, 1962" filed by the applicants on May 24, 1962, the reply thereto of The New York, Chicago and St. Louis Railroad Company, filed June 12, 1962; the pleading filed June 11, 1962, by the Chicago, Rock Island and Pacific Railroad Company and the Pullman Railroad Company, incorporating a petition for reconsideration of the order of the Commission dated May 15, 1962, a reply to applicants' petition for approval of a modified lease agreement, and a request for a hearing; and the reply of the Illinois Central Railroad thereto, filed June 13, 1962; and

It appearing, That the document filed May 24, 1962 by applicants does not comply with the order of May 15, 1962, in that the exhibit therein referred to does not constitute an agreement between applicants and the Chicago Regional Port District, as contemplated by the said order;

It further appearing, That the Chicago Rock Island and Pacific Railroad Company and the Pullman Railroad Company have, in their petition for reconsideration and further hearing presented no error of fact or law with respect to the matters complained of, except in respect of applicants' failure to comply with the requirement of the said order of May 15, 1962 for submission of the said agreement, and have failed to show that a further hearing in the proceedings is warranted;

It is ordered, That the petition for reconsideration and request for further hearing be, and it is hereby, denied.

It is further ordered, That unless, within 30 days from the date this order is served, applicants submit the centralized supervision agreement, properly executed by all parties applicant and the Chicago Regional Port District, for our consideration in connection with the modified use agreement, consideration will be given to the entry of an order vacating and setting aside the order entered herein September 19, 1960, and denial of the applications.

By the Commission.

Harold D. McCoy,
Secretary.

(Seal)

(Applicants' Submission In Compliance With The Commission's Orders Dated May 15, 1962 and August 23, 1962 was filed with the Commission September 26, 1962.)

APPENDIX G.

APPENDIX G.

THE INTERSTATE COMMERCE ACT

Being the Act to Regulate Commerce as Amended
Parts I, II, III, IV, and V

[The original act to regulate commerce was enacted Feb. 4, 1887. Amendments and additions thereto are indicated in the date line of each section. The Motor Carrier Act, Aug. 9, 1935, cited in the date line of many sections in part I, made one amendment to part I, i.e., it changed the words "this Act" wherever they appeared to "this part." 49 Stat. 543.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Short Title

[September 18, 1940.] [49 U.S.C. §§ 27, 301, 901, and 1001, notes.] This Act may be cited as the Interstate Commerce Act.

National Transportation Policy

[September 18, 1940.] [49 U.S.C., preceding §§ 1, 301, 901, and 1001.] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable

charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Note.—The Transportation Act of 1958, by § 15a (3), infra, provides for competitive ratemaking between carriers of different modes of transportation.

The following constitutes the first paragraph of section 500 of the Transportation Act, 1920, approved February 28, 1920, infra:

"Sec. 500. [U. S. Code, 49 U. S. C. § 142.] It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation."

Compare also the declaration of policy as to export rates on agricultural products, § 3 (1a), and the Hoch-Smith Resolution, § 55, infra.

See also the declaration of policy with respect to assuring the sound financial condition of rail carriers and avoiding interruption of employment, preamble to § 20b.

Section 1(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

Section 5 (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or

more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public

interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: Provided, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

Judicial Review

Sec. 10. [5 U. S. C. § 1009.] Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and Venue of Action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent

that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) Interim Relief.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) as authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or ap-

plicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.